Electronically Filed
Docket: 19-CRB-0005-WR (2021-2025)
Filing Date: 10/30/2020 05:54:33 PM EDT

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In re: **Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate those Performances (Web V)**	**Docket No. 19-CRB-0005-WR (2021-2025)**

SOUNDEXCHANGE'S REPLIES TO NRBNMLC'S CORRECTED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

October 28, 2020

TABLE OF CONTENTS

SoundExchange respectfully submits the following reply to NRBNMLC's proposed findings of fact and conclusions of law.

I. NRBNMLC AND ITS WITNESSES

Response to ¶ 1. No response.

A. Expert Witnesses

Response to ¶¶ 2-3. No response.

B. NRBNMLC Fact Witness and Designated Testimony

Response to ¶ 4. Ms. Burkhiser's testimony is of dubious relevance. Even NRBNMLC's own economists did not rely on it in forming their opinions. Ex. 3060 at 37-38 (Steinberg AWDT); Ex. 3061 at 40-43 (Cordes CWDT); Ex. 3064 at 14 (Steinberg CWRT). And NRBNMLC and SoundExchange agree that Family Radio's financial condition is irrelevant. *See* NRBNMLC PFFCL ¶ 259-60; *infra* Resp. to ¶ 259.

Response to ¶ 5. Mr. Emert's testimony is dated October 6, 2014—over six years ago. Ex. 3063 at 20 (Des. WDT of Emert, Web IV). NRBNMLC has undertaken to update Mr. Emert's biography (*e.g.*, suggesting that he is no longer President of Life Radio Ministries but has remained actively involved in Christian broadcasting), and also assumed that Life Radio Ministries' mission and programming have remained unchanged for the last six years. *Compare* NRBNMLC PFFCL ¶ 5, *with* Ex. 3063 ¶¶ 1-2 (Des. WDT of Emert, Web IV). However, there is no record evidence reflecting the current status of Mr. Emert or Life Radio Ministries. Mr. Ploeger testified that in 2018, SoundExchange received [[redacted]] in statutory royalties from Life Radio Ministries. Ex. 5625 ¶ 84 (Ploeger WRT).

Response to ¶ 6. No response.

C. Family Radio

Response to ¶ 7. Family Radio is not representative of the broader population of noncommercial webcasters, or even other large religious broadcasters, and does not provide a valid basis to draw economic conclusions about noncommercial webcasters in general. *See* SX PFF ¶¶ 1435-48.

Response to ¶ 8. Family Radio provides a lot of music programming. On average, it plays about [ ] recordings per hour. Ex. 5625 ¶ 40 n.31 (Ploeger WRT). Music is critical to its mix of programming, and it is important to Family Radio to provide music that will appeal to its audience. Ex. 5603 ¶ 156 (Orszag WRT); Ex. 5266; Ex. 5270 at 1; Ex. 5271 at 7, 9, 14, 17. Indeed, a Family Radio document [ ] Ex. 5271 at 7.

Response to ¶ 9. Family Radio uses a lot of popular music, including recordings by popular Christian artists like Natalie Grant, Michael W. Smith, Chris Tomlin, Mercy Me, and Casting Crowns, as well as other artists such as Josh Groban, the London Philharmonic, Andy Williams, Bing Crosby, and Debby Boone. Ex. 5625 ¶ 19 (Ploeger WRT); Ex. 5231; Ex. 5232. This is a similar selection of artists as featured on other large noncommercial Christian stations such as K-LOVE and JOY FM, as well as commercial stations like Sirius XM's The Message and commercial religious broadcasters. Ex. 5625 ¶¶ 18, 20, 22 n.8, 25 n.14 (Ploeger WRT).

Response to ¶ 10. Family Radio has made a strategic decision to migrate away from its aging and expensive terrestrial broadcasting infrastructure and use webcasting to reach its audience instead. That has allowed it to reduce its costs of broadcasting and free up money that was previously tied up in its broadcast infrastructure. *See* SX PFFCL ¶ 1430.

Response to ¶ 11. NRBNMLC and SoundExchange agree that it would be inappropriate to consider the financial health of Family Radio. *See* NRBNMLC PFFCL ¶ 260; *infra* Resp. to

¶ 259. To the extent it may be relevant, Family Radio's financial situation is the result of unique circumstances that include failed doomsday predictions accompanied by expensive advertising campaigns, as well as programming antagonistic to the organized church. SX PFFCL ¶¶ 1441-46. Despite its financial losses, statutory royalties are not material to the finances of Family Radio, or other large noncommercial webcasters for that matter. *See id.* ¶¶ 1433-34, 1447.

NRBNMLC's reference to [ ] as an "outlier" is arguably backward. [ ]. All but 20 noncommercial webcasters pay only the minimum fee. Ex. 5625 ¶ 46 (Ploeger WRT); *see* SX PFFCL ¶¶ 1366-71. From a purely financial perspective, the noncommercial webcaster portion of this proceeding is largely about determining what [ ] will pay.

II. NEITHER UNRELATED LEGISLATION NOR THE HISTORY OF NONCOMMERCIAL RATES SUGGESTS THAT NONCOMMERCIAL WEBCASTERS SHOULD RECEIVE GREATER EFFECTIVE RATE DISCOUNTS THAN THEY ALREADY GET

A. There Is No Dispute That the Judges Should Set Separate Rates for Noncommercial Webcasters

Response to ¶ 12. There is no disagreement among the participants that noncommercial webcasters and commercial webcasters should have different rate schedules. That has always been the case, and noncommercial webcasters have received substantial effective rate discounts as compared to commercial webcasters. *See* SX PFFCL ¶¶ 1349-63, 1475. SoundExchange's proposed rates would continue to provide large discounts to all noncommercial webcasters—even the largest. *See id.* ¶¶ 1366-71, 1419-27.

B. Congress Has Made Clear that Noncommercial Webcasters Are to Pay Willing Buyer/Willing Seller Rates

1. The Public Broadcasting Act Is Not Relevant

Response to ¶ 13. The Public Broadcasting Act pertains to certain over-the-air broadcast activities. 47 U.S.C. §§ 390, 397(13), 397(14). As regards webcasting, Congress has been clear that statutory royalty rates for webcasters of all kinds are to be ones "that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. §§ 114(f)(1)(B), 112(e)(4). At the same time it adopted that standard, Congress stated that a key objective of the statutory license is "to ensure that recording artists and record companies will be protected as new technologies affect the ways in which their creative works are used." H.R. Rep. No. 105-796, at 79 (1998) (Conf. Rep.). The Public Broadcasting Act—which became law 30 years before the webcasting statutory license—does not derogate from those principles in any way.

2. The Section 118 License Highlights That Section 112/114 Provide No Special Treatment for Noncommercial Webcasters

Response to ¶ 14. Section 118 of the Copyright Act is likewise irrelevant. That provision applies only to "nondramatic musical works and published pictorial, graphic, and sculptural works," not sound recordings. 17 U.S.C. § 118(b). The inclusion in Section 118 of special provisions for the use of those works by public broadcasting entities, as compared to the absence of such provisions in Sections 112(e) and 114, highlights that Congress intended to provide no special treatment for noncommercial webcasters in this proceeding. *See also In re Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV)*, 81 Fed. Reg. 26316, 26394 (2016) (hereinafter "*Web IV"*) (rejecting NRBNMLC effort to use Section 118 as a benchmark to set Section 112/114 rates for noncommercial webcasters).

3. The Small Webcaster Settlement Act and Subsequent Webcaster Settlement Acts Cannot Be Taken Into Account in this Proceeding and Do Not Provide Preferential Treatment for Noncommercial Webcasters

Response to ¶ 15. When Congress enacted the Small Webcaster Settlement Act, it specifically prohibited the use in ratesetting proceedings of that Act and rates agreed upon pursuant to that Act. Pub. L. No. 107-321, 116 Stat. 2780, 2782 (2002). The Judges must therefore reject NRBNMLC's flagrant violations of that Act and its successors and disregard NRBNMLC's attempt to bring that Act into this proceeding. Even if that Act could be taken into account, it applied to commercial and noncommercial webcasters, so it does not indicate any special desire to advantage noncommercial webcasters relative to commercial webcasters. *Id*. at 2781.

Response to ¶ 16. Congress likewise prohibited the use in ratesetting proceedings of the Webcaster Settlement Acts of 2008 and 2009 and the rates agreed upon pursuant to those Acts. 17 U.S.C. § 114(f)(4)(C). The Judges must disregard NRBNMLC's references thereto. Those Acts likewise applied to both commercial and noncommercial webcasters. *Id.* § 114(f)(4)(A).

Response to ¶ 17. The Judges must set a rate for noncommercial webcasters that meets the willing buyer/willing seller standard in Sections 112(e)(4) and 114(f)(1)(B). Adoption of SoundExchange's proposed rates would provide all noncommercial webcasters large discounts as compared to commercial webcasters. *See* SX PFFCL ¶¶ 1366-71, 1419-27.

C. The Judges and Their Predecessors Have Always Set Discounted Rates for Noncommercial Webcasters, as SoundExchange Proposes Here

Response to ¶ 18. The Judges and their predecessors have always provided statutory royalty rates for noncommercial webcasters that include significant effective rate discounts, as SoundExchange proposes here. *See id.* ¶¶ 1349-71, 1419-27. Large numbers of noncommercial webcasters have chosen to advance their missions by buying at the prices set. *E.g.*, Ex. 5625, App.

A ¶ 33 (Bender WDT) (903 noncommercial statutory licensees in 2018, excluding college broadcasters and NPR stations).

1. *Web I*

Response to ¶ 19. No response.

Response to ¶ 20. *Web I* was a litigated regulatory proceeding, not a marketplace negotiation. The *Web I* record reflected no valid marketplace benchmarks for noncommercial webcaster rates. *In re Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Report of the CARP at 89 (Feb. 20, 2002) (hereinafter "*Web I* CARP Report"). Instead, both the religious broadcasters' representative, NRBMLC, and the Recording Industry Association of America ("RIAA") relied on dubious analogies to regulated rates for musical work licensing. Ex. 5603 ¶ 167 (Orszag WRT). NRBMLC looked primarily to flat fees payable under nonprecedential agreements for licensing musical works for over-the-air broadcasting, an approach that the CARP rejected. *Web I* CARP Report at 90-92. In the absence of meaningful evidence, "RIAA 'borrowed a ratio'" from a previous CARP decision involving musical work licensing, where the rate set under the Section 118 statutory license was set at a rate one-third of that applicable to commercial services. *Id.* at 92; *see also In re Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45240, 45258 (July 8, 2002) (hereinafter "*Web I*"). The CARP was unhappy with the "infirmities" of RIAA's approach, but adopted it nonetheless. *Web I* CARP Report at 92-93. The Register accepted this approach, but adjusted the final rate for a change in the final commercial rate. *Web I,* 67 Fed. Reg. at 45259. The ratio proposed by RIAA in *Web I*, and rate finally based thereon, applied from the first performance (subject to a minimum fee credited toward the per-performance rate). There was no 159,140 ATH threshold below which a deeper discount applied. Ex. 5603 ¶ 168 (Orszag WRT).

Response to ¶ 21. There is no record evidence concerning the response of noncommercial webcasters to the *Web I* decision. Certainly NRBNMLC cites none, and some cherry-picked quotations expressing the personal policy views of Senator Helms are not that. Those quotations would not even be a reliable basis for interpreting the statute. *See, e.g., Zuber v. Allen*, 396 U.S. 168, 186 (1969) ("Floor debates reflect at best the understanding of individual Congressmen."); *Schwegmann Bros. v. Calvert Distillers Corp*., 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring) ("[T]o select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions."). And even if there *were* some record evidence of noncommercial webcaster reactions to the *Web I* decision (there is not), there is no reason to think that events that occurred almost 20 years ago would be informative concerning market conditions today. *See* SX PFFCL ¶¶ 1477, 1479.

While noncommercial webcasters did run to Congress to try to get it to overturn the *Web I* decision, the Judges must disregard NRBNMLC's attempt to introduce into this proceeding an agreement under the Small Webcaster Settlement Act. Congress commanded that such agreements not be taken into account in rate proceedings. Small Webcaster Settlement Act, Pub. L. No. 107-321, 116 Stat. 2780, 2782 (2002); *Notification of Agreement under the Small Webcaster Settlement Act of 2002*, 68 Fed. Reg. 35008, 35008-09 (June 11, 2003) ("The rates and terms set forth in such agreements . . . have no precedential value in any proceeding concerned with the setting of rates and terms for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings."). This is an appropriate result, because the "political circumstances" of the webcasters' lobbying efforts make agreements under the Act an unreliable indicator of "matters that would have been negotiated in the marketplace between a willing buyer and a willing seller."

17 U.S.C. § 114(f)(4)(C). As the Judges have recognized in another context, "[t]he compromises and tradeoffs that parties are prepared to make in the legislative arena have only the remotest resemblance to the give and take of the marketplace." *Web IV*, 81 Fed. Reg. at 26394.

Response to ¶ 22. Congress specifically prohibited use of the provisions of the Small Webcaster Settlement Act in ratesetting proceedings. Pub. L. No. 107-321, 116 Stat. 2780, 2782 (2002). The Judges must disregard NRBNMLC's attempt to bring that Act into this proceeding.

Senator Leahy's personal policy views are not evidence of anything. *Supra* Resp. to ¶ 21. However, his actual remarks were more balanced than NRBNMLC indicates. *E.g.*, 148 Cong. Rec. S11726 (daily ed. Nov. 20, 2002) (statement of Sen. Leahy) ("Artists and music labels may believe that they are foregoing significant royalties under this legislation."); *id*. at 11727 ("Compulsory licenses are no panacea and their implementation may only invite more congressional intervention.").

Response to ¶ 23. The Judges must disregard NRBNMLC's attempt to rely on an agreement under the Small Webcaster Settlement Act. *See supra* Resp. to ¶ 21. There is no record evidence concerning the economic impact of the *Web I* decision.

2. *Web II* (2006-2010)

Response to ¶ 24. NRBNMLC is entitled to have its own opinion of whether the Judges erred when they set noncommercial webcasting rates in *Web II*. However, when NRBNMLC appealed the Judges' decision, the D.C. Circuit affirmed the 159,140 ATH threshold with usage above that threshold payable at commercial rates. *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 574 F.3d 748, 763-64, 767-70 (2009) ("Although the Judges derived rates above a listenership threshold from the rates applicable to commercial webcasters, the Judges offered noncommercials a huge discount over these rates in the form of a monthly 159,140 ATH allowance that would be covered by a minimum fee.").

Response to ¶ 25. There is no record evidence concerning the response of noncommercial webcasters to the *Web II* decision. NRBNMLC cites none. And while noncommercial webcasters did try to get Congress to overturn the Judges' *Web II* decision, Congress has instructed the Judges not to take the provisions of the Webcaster Settlement Acts into account in ratesetting proceedings. 17 U.S.C. § 114(f)(4)(C). The Judges must disregard NRBNMLC's attempt to bring those Acts into this proceeding.

Response to ¶ 26. The Judges must also disregard NRBNMLC's attempt to rely on agreements under the Webcaster Settlement Acts. Such agreements are not to be taken into account in rate proceedings. *Id.*; *Notification of Agreements under the Webcaster Settlement Act of 2009*, 74 Fed. Reg. 40614, 40614, 40627 (Aug. 12, 2009) (hereinafter "*2009 WSA Notification*"); *Notification of Agreements under the Webcaster Settlement Act of 2008*, 74 Fed. Reg. 9293, 9293, 9295 (Mar. 3, 2009). There is no record evidence concerning the response of noncommercial webcasters to these agreements.

3. *Web III* (2011-2015)

Response to ¶ 27. Once again NRBNMLC violates the Webcaster Settlement Acts by invoking their terms contrary to Congress' express instruction that such agreements are not to be taken into account in rate proceedings. The Judges must disregard such terms. *Supra* Resp. to ¶¶ 25-26. There is no record evidence concerning the economic significance of these agreements. Certainly NRBNMLC cites none.

4. *Web IV* (2016-2020)

Response to ¶ 28. The Judges must disregard any comparison of nonprecedential Webcaster Settlement Act agreements with settlements adopted by the Judges in *Web IV*. Congress has specifically prohibited the Judges from taking nonprecedential Webcaster Settlement Act agreements into account in this proceeding. *Supra* Resp. to ¶ 26.

SoundExchange litigated noncommercial rates with NRBNMLC in *Web IV*, because unlike College Broadcasters, Inc. ("CBI"), the Corporation for Public Broadcasting ("CPB") and National Public Radio ("NPR"), NRBNMLC insisted on dramatic cuts to the statutory royalty rate for noncommercial webcasters in the form of a new "tiered and capped flat fee structure." *See Web IV*, 84 Fed. Reg. at 26391. Pursuant to NRBNMLC's proposed structure, even the largest noncommercial webcasters, such as [ ], Ex. 5625 ¶ 37 (Ploeger WRT), would have had their annual royalties capped at $1,500 per station or channel. *Web IV*, 84 Fed. Reg. at 26391. Thus, for example, [ ]. SX PFFCL ¶ 1386. Capping the royalties for just that one channel at $1,500 would have cut total noncommercial webcaster royalties (excluding college broadcasters and NPR stations) by [ ]. *See id*.

Response to ¶ 29. In *Web IV*, NRBNMLC made similar arguments to those it has made here concerning the supposed uniqueness of noncommercial webcasters and use of SoundExchange's settlement with CPB/NPR as a benchmark. *See id.* ¶¶ 1360, 1363. The Judges rejected those arguments, as they should reject NRBNMLC's arguments here. *See Web IV*, 84 Fed. Reg. at 26392-96; SX PFFCL ¶¶ 1361-63. And while NRBNMLC may believe that decision was in error, it did not appeal the Judges' determination. *See SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41 (D.C. Cir. 2018).

Response to ¶ 30. The Judges must disregard any comparison of nonprecedential Webcaster Settlement Act rates with the rates adopted by the Judges in *Web IV*. Congress has specifically prohibited the Judges from taking such agreements into account in this proceeding. *Supra* Resp. to ¶¶ 26, 28.

Much as NRBNMLC might complain about the *Web IV* determination, NRBNMLC and SoundExchange agree that it would be inappropriate to consider the economic impact of that decision on noncommercial webcasters. *See* NRBNMLC PFFCL ¶ 260; *infra* Resp. to ¶ 259. To the extent it may be relevant, the *Web IV* decision had an immaterial effect on noncommercial webcasters. Approximately 97% of noncommercial webcasters pay only the minimum fee, which did not change in *Web IV*. *See* SX PFFCL ¶¶ 1366-71. In 2018, there were only 20 noncommercial webcasters that paid more than the minimum fee. Ex. 5625 ¶ 46 (Ploeger WRT); *see also id.*, App. E. [ ]. *Id.*, App. E. Statutory royalties are simply not material to the finances of even the five noncommercial webcasters with the highest level of usage. Specifically, statutory royalties accounted for [ ] of their total expenses, [ ] of their program expenses, and [ ] of their revenue in 2018. SX PFFCL ¶ 1433.

Response to ¶ 31. Noncommercial religious broadcasters dominate the noncommercial webcaster rate category due to their high listenership. For example, [ ]. SX PFFCL ¶¶ 1372-73, 1386. The large noncommercial webcasters receive deep effective rate discounts as compared to commercial webcasters. *See id.* ¶¶ 1419-27. It is entirely appropriate that such webcasters receive a decreasing effective rate discount as their usage increases, because they use similar music as commercial webcasters and compete directly with commercial religious broadcasters. *See id.* ¶¶ 1375-1414. In an unregulated market, they would not pay royalties at a dramatically different rate than commercial webcasters. *See id.* ¶¶ 1415-18.

While SoundExchange wishes that it could have reached a satisfactory agreement with NRBNMLC to avoid litigating noncommercial webcaster royalty rates in both *Web IV* and *Web V*,

NRBNMLC has refused to recognize that noncommercial webcasters with large and fast-growing listenership are not the same as college radio stations and NPR stations. As described above, in *Web IV*, NRBNMLC proposed that noncommercial webcasters should pay only *de minimis* statutory royalties. *Supra* Resp. to ¶ 28. Until it filed an amended rate request on the eve of trial in this proceeding, NRBNMLC Amended Proposed Rates and Terms (filed July 31, 2020), NRBNMLC continued to insist that even the largest noncommercial webcasters should receive approximately a 99% discount from commercial webcasting rates. NRBNMLC Proposed Rates and Terms at 8 (filed Sept. 23, 2019); Ex. 5625 ¶¶ 39-43 (Ploeger WRT).

D. Comparisons of the *Web IV* Price per ATH for NPR Stations and Noncommercial Religious Broadcasters Are Not Informative

Response to ¶ 32. This is the third webcasting rate proceeding in which NRBNMLC has advocated using a settlement between SoundExchange and CPB/NPR as a benchmark to set statutory royalty rates for other noncommercial webcasters, particularly noncommercial religious broadcasters. However, it was not apparent at the time SoundExchange filed its written rebuttal statement that NRBNMLC was even proposing a CPB/NPR benchmark, limiting SoundExchange's ability to respond. *See infra* Rep. to ¶ 241. The Judges rejected that proposed benchmark in both *Web II* and *Web IV*. *See* SX PFFCL ¶¶ 1354, 1363. They should do so again.

NRBNMLC continues to ignore the many significant differences between large noncommercial religious broadcasters and NPR stations, as well as the significant differences in the payment and reporting arrangements under the royalty rate structures for noncommercial webcasters and NPR stations. *See id.* ¶¶ 1482-1505; *infra* Resp. to ¶¶ 120-85. Among those differences is that no fees are actually charged to NPR-affiliated noncommercial broadcasters at all. Instead, CPB pays their statutory royalties with federal government money. *See infra* Resp. to ¶¶ 121, 131. The Judges have made clear that "the key characteristic of a good benchmark" is

"comparability." *In the Matter of Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 78 Fed. Reg. 23054, 23058 (2013) (hereinafter "*SDARS II*"); *see also* SX PFFCL ¶ 1488. Yet even when a comparable benchmark is found, it is typically necessary to make adjustments to account for differences. *See* SX PFFCL ¶ 68. A difference in the average price per ATH under the rate structures for large noncommercial religious broadcasters and NPR stations is meaningless when the benchmark is not comparable and NRBNMLC has not even tried to adjust for differences.

NRBNMLC's economic experts provide little support for using the CPB/NPR settlement as a benchmark. Professor Cordes did not even mention the CPB/NPR settlement in his written testimony. He advocated using SoundExchange's agreement with CBI as a potential benchmark. Ex. 3061 ¶¶ 33-36 (Cordes CWDT). Professor Steinberg has increasingly embraced the CPB/NPR settlement as a benchmark over the course of the proceeding, but he failed to assess the comparability of the CPB/NPR settlement as a benchmark. *See* SX PFFCL ¶¶ 1486-1505. And while Professor Steinberg does various calculations involving the CPB/NPR settlement, he never even suggests the comparison between the average per-ATH royalty for large noncommercial religious broadcasters and NPR stations that NRBNMLC presents in this Part of its Proposed Findings and Conclusions. Ex. 3060 ¶¶ 33-39 (Steinberg AWDT); Ex. 3064 ¶¶ 4-10 (Steinberg CWRT). This seems to simply be the work of counsel to NRBNMLC, and there is no reason to believe it is economically informative.

Response to ¶ 33. NRBNMLC's calculations of the number of channels or stations offered by the 20 noncommercial webcasters with usage in excess of the 159,140 ATH threshold, as well as their minimum fee payments and total royalties, are off by two channels or stations and $1,000.

The correct numbers are [redacted] channels or stations,[1] [redacted] in minimum fees, and [redacted] in total royalties. Ex. 5625, App. E (Ploeger WRT). Using the correct numbers in the calculations in the following paragraphs would modestly reduce the difference in the average per-ATH royalty for large noncommercial religious broadcasters and NPR stations, but the difference is not informative even if calculated correctly. *Supra* Resp. to ¶ 32.

Response to ¶¶ 34-38. SoundExchange incorporates its responses to ¶¶ 32-33, *supra*.

E. SoundExchange's Proposed Rates Will Have a Minimal Effect on Family Radio

Response to ¶ 39. The Judges must disregard NRBNMLC's attempt to rely on rates under a non-precedential agreement pursuant to the Webcaster Settlement Act. The rates in such agreements are not to be taken into account in rate proceedings. 17 U.S.C. § 114(f)(4)(C); *2009 WSA Notification*, 74 Fed. Reg. at 40627. In any event, Family Radio has not been harmed by the current statutory rates set by the Judges in *Web IV*. Its 2018 statutory royalties constituted only [redacted] of its 2018 revenues and [redacted] of its 2018 program expenses. SX PFFCL ¶ 1447. In 2018, Family Radio spent more on travel expenses ($68,840) and accounting fees ($60,000) than it did on statutory royalties. *Id.*

Response to ¶ 40. Family Radio benefits substantially from the current rates. For 2018, Family Radio received an effective rate discount of [redacted] off of the commercial rates. *Id.* ¶ 1424. Under SoundExchange's rate proposal, Family Radio would receive approximately the same discount in the *Web V* period. *Id.* ¶ 1425.

Response to ¶ 41. The Judges must disregard NRBNMLC's references to a 2015 rate, and comparisons thereto, because that was a rate under a non-precedential agreement pursuant to the

[1] Calculated as [redacted] in minimum fees ÷ $500.

Webcaster Settlement Act. The rates in such agreements are not to be taken into account in rate proceedings. 17 U.S.C. § 114(f)(4)(C).

Response to ¶ 42. SoundExchange incorporates its response to ¶ 41 *supra*.

Response to ¶ 43. SoundExchange incorporates its response to ¶ 39 *supra*. Additionally, Family Radio's decision to decrease its broadcast footprint is the result of a strategic decision to migrate away from its aging and expensive terrestrial broadcasting infrastructure and use webcasting to reach its audience instead. That has allowed it to reduce its costs of broadcasting and free up money that was previously tied up in its broadcast infrastructure. *See* SX PFFCL ¶ 1430. The decision to pursue that strategy was driven by unique circumstances unrelated to streaming rates. *See id.* ¶ 1441-45.

III. NONCOMMERCIAL WEBCASTERS MAY CONSTITUTE A DISTINCT MARKET SEGMENT, BUT ONLY TO A POINT

Response to ¶ 44. In this proceeding, NRBNMLC rehashes all the same arguments it has made before about the "myriad of characteristics that they claim set them apart from commercial broadcasters." *Web II*, 72 Fed. Reg. at 24098. That there are certain differences between commercial and noncommercial webcasters isn't really disputed. After all, "NRBNMLC and SoundExchange both proposed that the Judges adopt a different rate structure for noncommercial webcasters than for commercial webcasters. *Web IV*, 81 Fed. Reg. at 26320. However, NRBNMLC exaggerates the extent and consequences of the differences, and after more than 20 pages of talking about those differences, even it acknowledges that noncommercial broadcasters are also like commercial broadcasters in certain respects. NRBNMLC PFFCL ¶¶ 103-10.

SoundExchange's rate proposal is extremely favorable to noncommercial webcasters. As at the time of *Web IV*, about 97% of them will pay only the minimum fee, which provides them up to about a 99% effective rate discount from commercial rates. *See* SX PFFCL ¶¶ 1366-71. The

handful of large noncommercial webcasters with high levels of usage would receive substantial discounts too, with the largest of them, [ ]. *See id.* ¶¶ 1426-27; *Intercollegiate Broad. Sys.*, 574 F. 3d at 764 ("a huge discount").

NRBNMLC argues that the largest noncommercial webcasters should receive even greater effective rate discounts than they are getting under the current rate structure. However, as in past proceedings, NRBNMLC's "testimony tells the Judges nothing about the sellers' side of the equation." *Web IV*, 81 Fed. Reg. at 26394; *see also Intercollegiate Broad. Sys.*, 574 F. 3d at 768 (NRBNMLC argument "speaks only to the willingness of the buyer to enter the transaction and says nothing of the seller"). When the Judges have looked at the sellers' side of the equation, they have found that "'noncommercial' webcasters *may* constitute a distinct segment of the noninteractive webcasting market," but only "up to a point." *Web II*, 72 Fed. Reg. at 24097 (emphasis added); *accord Web IV*, 81 Fed. Reg. at 26392. The D.C. Circuit found this to be "a reasonable compromise between the two positions." 574 F. 3d at 768-69.

Ever since *Web II*, the Judges have employed a 159,140 ATH per month threshold as a "proxy that aims to capture the characteristics that delineate the noncommercial submarket." *Web IV*, 81 Fed. Reg. at 26393 (quoting *Web II*, 72 Fed. Reg. at 24099); *see* SX PFFCL ¶¶ 1349-54, 1375. It remains the case that, considering the sellers' side of the equation, "economic logic dictates" that "the Judges apply commercial rates to noncommercial webcasters above the ATH threshold." *Web IV*, 81 Fed. Reg. at 26395. As Mr. Orszag explained, it is self-evident that noncommercial webcasters that exceed the ATH threshold because they play more music and have more listeners are "more likely to take away share from" commercial webcasters. 8/13/20 Tr.

1994:23-1995:8 (Orszag). NRBNMLC's expert, Professor Cordes, acknowledged as much in response to a question from Judge Strickler, agreeing that a noncommercial webcaster could compete with a commercial webcaster "simply by growing large because of its popularity." 8/20/20 Tr. 3275:4-3276:16 (Cordes).

As a result, there is no basis to assume that in willing buyer/willing seller negotiation between a record company and a large noncommercial webcaster, the record company would be willing to allow the noncommercial webcaster to make millions of performances per month at a deep discount from commercial rates. SX PFFCL ¶ 1377. The largest noncommercial webcasters are well-positioned to pay statutory royalties under the current rate structure even at the higher rate levels proposed by SoundExchange. *See id.* ¶¶ 1428-34.

A. The Nonprofit Objectives and Behaviors Identified By NRBNMLC Do Not Warrant a Deeper Discount for Noncommercial Webcasters Than They Already Get

1. The Nondistribution Constraint Does Not Restrict Access to Capital or Willingness to Pay to an Extent That Warrants a Deeper Discount

Response to ¶ 45. No response.

Response to ¶ 46. As discussed in further detail below, the nondistribution constraint does not prevent large noncommercial webcasters from having ample financial resources to pay statutory royalties pursuant to a rate structure that involves paying commercial rates for usage above the 159,140 ATH threshold. *See* SX PFFCL ¶¶ 1428-34.

Response to ¶ 47. SoundExchange incorporates its response to ¶ 46 *supra*.

Response to ¶ 48. SoundExchange incorporates its response to ¶ 46 *supra*. Additionally, and as Professor Cordes acknowledged during his cross examination, "[t]ax exemption confers financial advantages on nonprofit organizations that other providers of goods and services do not

enjoy," and "income tax exemption can cause nonprofit organizations to become more commercial." 8/24/20 Tr. 3303:22-3304:1, 3305:24-3306:6 (Cordes); *see also* SX PFFCL ¶ 1413.

Response to ¶ 49. While NRBNMLC contends that "nonprofits are free to pursue their charitable and educational missions subject only to the need to remain solvent," the financial viability of noncommercial webcasters, like commercial webcasters, depends on providing programming that will appeal to and generate an audience that can be monetized. Thus, a noncommercial webcaster must provide programing sufficiently compelling to convert listeners to fans and ultimately to donors. SX PFFCL ¶¶ 1382-84.

The mere fact that a nonprofit organization has a mission and is subject to the nondistribution constraint does not preclude engaging in activities that are rewarded in the marketplace and involve competition with for-profit firms. *Id.* ¶ 1411. For example, an article Dr. Steinberg highlights in his testimony provides examples of that, including sale of insurance by organizations such as Blue Cross, and YMCAs competing with health clubs, hospitals, and childcare centers. *Id.* ¶ 1412.

Response to ¶ 50. The Judges have long understood that "[n]oncommercial webcasters have different sources of funding than ad-supported commercial webcasters—such as listener donations, corporate underwriting or sponsorships, and university funds." *Web II*, 72 Fed. Reg. at 24098. However, nonprofit status has advantages as well as limitations. As Professor Cordes acknowledged, income tax exemption, property tax exemption, tax-exempt debt financing, and charitable deductions are ways in which the government subsidizes nonprofit organizations and provides support for their operations. 8/24/20 Tr. 3304:2-4. 3307:9-11, 3310:6-13, 3337:13-16 (Cordes); *see also, e.g.*, 26 U.S.C. §§ 170, 501(c)(3). With these advantages, the noncommercial webcasters with the highest usage have become large and well-resourced organizations. SX

PFFCL ¶¶ 1428-34. For example, in 2018, EMF received over $180 million in contributions and grants and had a financial surplus of almost $55 million. Ex. 5238 at 6.[2]

Nonprofit organizations also have been able to access debt capital notwithstanding the nondistribution constraint. Indeed, Professor Cordes' own research shows that charitable organizations had "over $392 billion in outstanding tax-exempt bonds in 2011," which Professor Cordes characterized as "an explosion in tax-exempt borrowing." 8/24/20 Tr. 3309:13-20 (Cordes). The nondistribution constraint has not prevented EMF from raising debt capital. As of 2016, it had raised over $65 million through tax-exempt debt financing. Ex. 5473 at 43, Part I(A)-(D) & Line 3; 8/24/20 Tr. 3339:1-24 (Cordes). NRBNMLC's general, theoretical observations are insufficient to establish that the largest noncommercial webcasters have a lower willingness to pay than commercial services.

Response to ¶¶ 51-52. SoundExchange incorporates its response to ¶ 50 *supra*.

2. Noncommercial Broadcasters' Missions Do Not Warrant a Deeper Discount

Response to ¶ 53. As the Judges observed in *Web II*, when NRBNMLC talks about mission, "[t]he implication is that noncommercial webcasters do not compete with commercial webcasters." *Web II*, 72 Fed. Reg. 24098. However, it was true 14 years ago and it remains true today that "[m]usic programming found on noncommercial stations competes with similar music programming found on commercial stations." *Id.* There is ample evidence of this. *See* SX PFFCL ¶¶ 1376-79, 1381-1414; *see also id.* ¶¶ 1065-73. It is also possible that mission may follow from a wish to pay less. SomaFM was a small commercial webcaster that became a noncommercial webcaster to reduce its royalty cost when its business model did not monetize well. *See id.* ¶ 1389.

[2] The record includes two different versions of EMF's financial statements for 2018. These Replies to Proposed Findings and Conclusions generally refer to the more conservative audited financial statements in Exhibit 5238. EMF's 2018 IRS Form 990 reports revenue and financial surplus that are about $5 million higher. Ex. 5482 at 1.

Transitioning to a less remunerative business model is not a practice that copyright owners would likely wish to support in a free market. *See infra* Resp. to ¶ 211.

Response to ¶¶ 54-55. SoundExchange incorporates its response to ¶ 53 *supra*.

Response to ¶ 56. Exhibit 3053 is the 2017 IRS Form 990 for the Moody Bible Institute, the [redacted]. Ex. 5625, App. E (Ploeger WRT). In 2018, it paid statutory royalties of [redacted]. *Id*. Its Form 990 shows 2017 revenue of over $116 million. Ex. 3053 at 1. Exhibit 5239 is the 2017 IRS Form 990 for the KSBJ Educational Foundation, the [redacted]. Ex. 5625, App. E (Ploeger WRT). In 2018, it paid statutory royalties of [redacted]. *Id*. Its Form 990 shows 2017 revenue of over $14 million. Ex. 5239 at 1. Exhibit 5241 is the 2017 IRS Form 990 for Radio Training Network, the [redacted]. Ex. 5625, App. E (Ploeger WRT). In 2018, it paid statutory royalties of [redacted]. *Id*. Its Form 990 shows 2017 revenue of almost $23 million. Ex. 5239 at 1. Exhibit 3075 is the 2017 IRS Form 990 for New York Public Radio. Its statutory royalties are paid with federal government funding through CPB. *See* SX PFFCL ¶ 1497. Statutory royalties are clearly not interfering with the ability of any of these organizations to carry out their missions.

Response to ¶ 57. SoundExchange incorporates its response to ¶ 53 *supra*.

Response to ¶ 58. The Judges have long understood that "a noncommercial religious broadcaster that streams a simulcast of its broadcasts is prohibited under FCC regulations from selling advertising." *Web IV*, 881 Fed. Reg. at 26319. This simply means that they "have different sources of funding." *Web II*, 72 Fed. Reg. at 24098; *see supra* Resp. to ¶ 50. Neither Professor Cordes nor Professor Steinberg make any empirical effort to compare this funding to the advertising revenue of commercial webcasters. *See generally* Ex. 3060 (Steinberg AWDT); Ex.

3061 (Cordes CWDT); *see also* 8/26/20 Tr. 4061:2-6 (Steinberg) (acknowledging that he did not compare revenues of EMF to the revenues of any commercial religious webcasters). Furthermore, as Professor Cordes acknowledged in response to a question posed by Chief Judge Feder, "the absence of commercial advertising on a non-commercial religious broadcaster potentially give[s] it a competitive advantage in reaching listeners." 8/24/20 Tr. 3343:2-7 (Cordes).

Response to ¶ 59. NRBNMLC identifies no evidence beyond its experts' say-so that a noncommercial webcaster's mission renders it "inherently less profitable" than commercial webcasters. And NRBNMLC fails to grapple with evidence illustrating that noncommercial webcasters can be quite profitable. For example, in 2018, EMF had a financial surplus of about $55 million. Ex. 5238 at 6.

a. Both Commercial and Noncommercial Webcasters' Ability to Monetize an Audience Depends on Popular Programming

Response to ¶ 60. The financial viability of both commercial and noncommercial webcasters depends on providing programming that will appeal to and generate an audience that can be monetized—*i.e.*, generate advertising revenue for commercial webcasters or listener donations for noncommercial webcasters. *See* SX PFFCL ¶¶ 1382, 1384. And as NRBNMLC later acknowledges, there are significant similarities between noncommercial broadcasters and commercial broadcasters. NRBNMLC PFFCL ¶¶ 103-10.

Response to ¶ 61. From the perspective of listeners to commercial and noncommercial stations, the experience is similar. Both commercial and noncommercial webcasters have a mix of music and non-music programming. *Id.* ¶ 106. And both have interruptions in their programming to monetize their audience. SX PFFCL ¶ 1383; *see* 8/13/20 Tr. 1967:5-7 (Orszag) (comparing listening to ads for consumer products on commercial stations to calls for fundraising on noncommercial stations). However, as Professor Cordes acknowledged, "the absence of

commercial advertising on a non-commercial religious broadcaster potentially give[s] it a competitive advantage in reaching listeners." 8/24/20 Tr. 3343:2-7 (Cordes).

Response to ¶ 62. Commercial religious broadcasters are overtly religious in their marketing and on-air content. *See* SX PFFCL ¶¶ 1404-05. Thus, both noncommercial broadcasters and commercial broadcasters air programming such as prayer requests, talk and teaching on religious topics, and inspiring stories. NRBNMLC PFFCL ¶ 106. The noncommercial Christian music stations that pay the vast majority of noncommercial webcasting royalties play similar music to commercial Christian music stations. *See* SX PFFCL ¶¶ 1391-1403. For example, a summary of Mediabase data presented by Mr. Ploeger showed that in the third quarter of 2019, a core repertoire of 961 recordings by 259 artists constituted 97.4% of the total plays on a sample of 10 commercial contemporary Christian music stations and 97.7% of the total plays on a sample of 10 noncommercial contemporary Christian music stations. *See id.* ¶¶ 1399-1400. The absence of commercial advertising on noncommercial stations allows them to play more recordings per hour, free of charge to listeners, without ads, giving them a competitive advantage over commercial stations. *See* 8/24/20 Tr. 3343:2-7 (Cordes); *see also* Ex. 5625 ¶ 40 n.31 (Ploeger WRT) (playlist data downloaded from Mediabase showed that commercial contemporary Christian music stations played about 13 recordings per hour, and noncommercial contemporary Christian music stations played about 14 recordings per hour).

b. Noncommercial Webcasters Engage Their Audiences with Popular Music Programming

Response to ¶ 63. Noncommercial webcasters are certainly interested in reaching an audience. As Professor Steinberg acknowledged at trial, noncommercial webcasters are able to advance their mission by appealing to listeners and getting "as many as they can get." 8/26/20 Tr. 4047:18-25 (Steinberg); *see also* 8/24/20 Tr. 3340:21-3341:5 (Cordes) (responding to Chief Judge

Feder that, in pursuing their mission, "logic would imply" that noncommercial religious webcasters "would want to reach as many potential faithful . . . as they could"). Reaching an audience also is necessary to develop fans and ultimately cause them to become donors. Ex. 5603 ¶ 157 (Orszag WRT); Ex. 5271 at 15. Thus, it is hardly surprising that EMF describes its mission as "[t]o create and distribute compelling media." Ex. 5482 at 1. The way that the noncommercial webcasters that pay the vast majority of statutory royalties engage with their audiences is through music. *See* SX PFFCL ¶ 1381.

Response to ¶ 64. SoundExchange incorporates its responses to ¶¶ 58-59 *supra*.

Response to ¶ 65. Family Radio uses a lot of music. *See supra* Resp. to ¶ 8. Among the recordings it uses are ones by popular Christian artists like Natalie Grant, MercyMe, Casting Crowns, Michael W. Smith, and Chris Tomlin, and during the holiday season it uses Christmas recordings by other artists. SX PFFCL ¶ 1395. These are similar top Christian artists as played on commercial Christian music stations and other noncommercial Christian music stations. *See id.* ¶¶ 1394, 1406-07; Ex. 3040 (Tab "[ ]").

Response to ¶ 66. Whatever decisions noncommercial webcasters may make about particular streams of revenue, the large noncommercial webcasters that use the most music and pay the vast majority of noncommercial webcaster statutory royalties are well-resourced organizations with substantial revenues. *See* SX PFFCL ¶¶ 1431-34; Ex. 5605, App. 3 (Tucker CWRT). In 2018, EMF had over $184 million in revenue. Ex. 5238 at 6. Further, as NRBNMLC later acknowledges, local public interest programming does not distinguish noncommercial broadcasters from commercial broadcasters. NRBNMLC PFFCL ¶¶ 105, 108-09. To the extent NRBNMLC suggests that public interest programming might affect the market price of sound

recordings, the Judges have previously rejected such arguments. *See Web IV*, 81 Fed. Reg. at 26321; *see* SX PFFCL ¶¶ 1135-39.

Response to ¶ 67. SoundExchange incorporates its responses to ¶¶ 62, 65 *supra*.

Response to ¶ 68. While NRBNMLC witnesses contended that noncommercial broadcasters view sound recordings as less important to achieving their mission, ample objective evidence indicates that they are choosing to use sound recordings to advance their missions. *See supra* Resp. to ¶¶ 49, 62, 63, 65. For example, EMF's K-LOVE, a contemporary Christian music channel that [[redacted]], *see* SX PFFCL ¶ 1368, markets itself on Google as playing "positive, encouraging contemporary Christian music from artist like Chris Tomlin, Casting Crowns, Lauren Daigle, Matthew West and more." Ex. 5625 ¶ 22 n.8 (Ploeger WRT). A document produced by NRBNMLC [[redacted]]. Ex. 5271 at 7. As Professor Tucker explained, music is "definitely integral" to such Christian music stations. 8/17/20 Tr. 2230:15-21 (Tucker).

Response to ¶ 69. SoundExchange incorporates its responses to ¶¶ 58, 61-62 *supra*.

Response to ¶ 70. SoundExchange incorporates its responses to ¶¶ 58-59, 61-62 *supra*.

Response to ¶ 71. Professor Cordes's testimony regarding a higher price elasticity of demand for noncommercial webcasters is purely speculative, as he has performed no empirical analysis of the relative demand elasticities of noncommercial webcasters or commercial webcasters. Ex. 3061 ¶ 24 (Cordes CWDT) (acknowledging the lack of "empirical estimates of the relative demand elasticities of commercial and noncommercial webcasters"). Furthermore, Professor Cordes's suggestion that noncommercial webcasters are "high elasticity demanders," willing to stream more sound recordings if offered at a lower price, *id.* ¶ 23, would only result in

more songs played per hour, without ads, by noncommercial webcasters, and an even greater competitive advantage over commercial webcasters. *See supra* Resp. to ¶¶ 58, 62. This is not a result that copyright owners would be willing to support in an unregulated market. *See* SX PFFCL ¶¶ 1415-18.

Response to ¶ 72. SoundExchange incorporates its response to ¶ 44 *supra*.

3. Noncommercial Broadcasters' Objectives and Constraints Do Not Warrant a Deeper Discount

Response to ¶ 73. NRBNMLC has not established that noncommercial webcasters should receive deeper discounts than they already get. *See* Resp. to ¶¶ 74-81; SX PFFCL ¶¶ 1428-34.

a. Differences in Funding Sources Do Not Warrant a Deeper Discount

Response to ¶ 74. SoundExchange incorporates its responses to ¶¶ 50, 58-59 *supra*.

Response to ¶ 75. SoundExchange incorporates its responses to ¶¶ 60-61 *supra*.

Response to ¶ 76. Both commercial and noncommercial webcasters depend on providing programming that will appeal to and generate an audience that can be monetized. While the relationship between audience size and revenue is more direct in the case of commercial services, listener donations to noncommercial services increase as audience size increases and listeners are converted to fans to ultimately donors. *See* SX PFFCL ¶ 1382; *supra* Resp. to ¶¶ 49, 60-61, 63.

Response to ¶ 77. While the relationship between audience size and revenue is less direct in the case of noncommercial services, *see supra* Resp. to ¶ 76, the noncommercial webcasters with the highest usage are large and well-resourced organizations. *See* SX PFFCL ¶¶ 1428-34. For example, in 2018, EMF received over $180 million in contributions and grants, had over $184 million in total revenue, and had a financial surplus of almost $55 million. Ex. 5238 at 6. Other top-paying noncommercial webcasters also had substantial revenues. Ex. 5605, App. 3 (Tucker

CWRT). NRBNMLC's general, theoretical observations are insufficient to establish that the largest noncommercial webcasters have a lower willingness to pay than commercial services.

Response to ¶ 78. SoundExchange incorporates its responses to ¶ 76 *supra*. In addition, the programming that noncommercial religious broadcasters stream over the interest is the same as their broadcast programming. NRBNMLC PFFCL ¶¶ 70, 103.

Response to ¶ 79. SoundExchange incorporates its responses to ¶¶ 50, 58 *supra*.

b. Differences in Employee Compensation Do Not Result in a Lower Willingness to Pay

Response to ¶ 80. It is not clear why NRBNMLC believes that employee compensation is relevant to setting sound recording royalties. Sound recording rights and the services of employees are two of many separate inputs to their webcasting services. As a benchmark, employee compensation is no more comparable than the costs of computers or musical work rights, because (among other things) it involves different sellers and something other than sound recording rights being purchased. See NRBNMLC PFFCL ¶ 119; *Web IV*, 81 Fed. Reg. at 26394 (rejecting musical works benchmark proposed by NRBNMLC); *Web II*, 72 Fed. Reg. at 24097 (same).

In any event, the large noncommercial webcasters that pay the vast majority of noncommercial webcasting statutory royalties are well-resourced organizations that pay substantial employee compensation. *E.g.*, Ex. 5482 at 7-8 (EMF 2018 IRS Form 990 reporting compensation of 12 employees with individual total compensation over $190,000 per year, and overall total compensation for the 12 employees of over $3.6 million).

Response to ¶ 81. SoundExchange incorporates its response to ¶ 80 *supra*.

B. Taking Into Account the Sellers' Side of the Equation, Large Noncommercial Webcasters Do Not Constitute a Distinct Submarket

Response to ¶ 82. The current statutory royalty rate structure and SoundExchange's rate proposal provide substantial effective rate discounts for *all* noncommercial webcasters as

compared to commercial webcasters. *See supra* Resp. to ¶ 44. NRBNMLC would like deeper discounts for the largest noncommercial webcasters. However, NRBNMLC's "testimony tells the Judges nothing about the sellers' side of the equation." *Web IV*, 81 Fed. Reg. at 26394. When one considers the sellers' side, "economic logic dictates" that "the Judges apply commercial rates to noncommercial webcasters above the ATH threshold." *Id.* at 26395.

This is because there are obvious differences between the small "bare-bones operations" that Dr. Steinberg described, Ex. 3060 ¶ 17 (Steinberg AWDT), and the large noncommercial webcasters that pay the vast majority of noncommercial webcasting statutory royalties. SX PFFCL ¶¶ 1428-34. For example, in 2018, EMF had over $184 million in total revenue and a financial surplus of almost $55 million. Ex. 5238 at 6. It also transmitted an estimated total of [ ] performances in 2018 and [ ]. Ex. 5625 ¶¶ 22, 37 (Ploeger WRT). Nobody could reasonably expect that in a willing buyer/willing seller negotiation, a record company would view a juggernaut like EMF as in any way equivalent to Acaville.com, AframSouth or the other small noncommercial webcasters described by Mr. Ploeger. Ex. 5625 ¶¶ 44 (Ploeger WRT); *see* SX PFFCL ¶¶ 1372-1466; *supra* Resp. to ¶ 44.

Response to ¶ 83. SoundExchange incorporates its response to ¶ 82 *supra*.

1. When Commitment to Mission Involves Significant Competition with Higher-Paying Commercial Services, Willing Sellers Would Not Grant Larger Discounts

Response to ¶ 84. The mere fact that noncommercial webcasters have a mission and are subject to different legal constraints than commercial webcasters does not preclude competition between noncommercial webcasters and commercial webcasters. *See supra* Resp. to ¶ 53.

Response to ¶ 85. While the requirement that a noncommercial webcaster advance an educational mission applies to those both large and small, Professor Cordes acknowledged that

even if a noncommercial webcaster did not set out to compete with a commercial webcaster, the noncommercial webcaster could compete with a commercial webcaster "simply by growing large because of its popularity." 8/20/20 Tr. 3275:4-3276:16 (Cordes); *see supra* Resp. to ¶ 44. In fact, there is significant evidence of competition between large noncommercial webcasters and commercial services. *See* SX PFFCL ¶¶ 1385-1414.

Response to ¶ 86. SoundExchange incorporates its responses to ¶¶ 58, 60-61, 63 *supra*.

2. The Nondistribution Constraint Does Not Imply That Willing Sellers Would Grant Larger Discounts to Large Noncommercial Webcasters

Response to ¶ 87. The nondistribution constraint does not prevent large noncommercial webcasters from having ample financial resources to pay statutory royalties pursuant to a rate structure that involves paying commercial rates for usage above the 159,140 ATH threshold. *See* SX PFFCL ¶¶ 1428-34; *supra* Resp. to ¶¶ 49-50, 56. NRBNMLC's general, theoretical observations are insufficient to establish that the largest noncommercial webcasters have a lower willingness to pay than commercial services.

3. When One Considers the Sellers' Side, Economic Logic Dictates that the Judges Apply Commercial Rates to Usage by Large Noncommercial Webcasters above 159,140 Monthly ATH

Response to ¶ 88. NRBNMLC again fails to acknowledge "the sellers' side of the equation." *Web IV*, 81 Fed. Reg. at 26394. When one considers the sellers' side, "economic logic dictates" that "the Judges apply commercial rates to noncommercial webcasters above the ATH threshold." *Id.* at 26395; *Intercollegiate Broad. Sys.*, 574 F. 3d at 768 ("[C]ompetition certainly would affect the actions of a willing seller, as the Judges noted."); *supra* Resp. to ¶ 44.

4. Large Noncommercial Webcasters with Usage that Exceeds the ATH Threshold Compete with Commercial Webcasters

Response to ¶ 89. The largest noncommercial webcasters that pay the vast majority of noncommercial webcasting statutory royalties are all simulcasters of contemporary Christian

music broadcast stations. Ex. 5625 ¶ 46 (Ploeger WRT). And their missions involve reaching an audience with music programming. *E.g.*, Ex. 5482 at 1 (EMF's mission is "[t]o create and distribute compelling media that inspires and encourages our stakeholders/listeners to have a meaningful relationship with Jesus Christ."); Ex. 5625 ¶ 22 n.8 (Ploeger WRT) (EMF marketing itself as playing "positive, encouraging contemporary Christian music"). Because they play a lot of music, and similar music to commercial services, their programming is not clearly differentiated from commercial services, particularly simulcasts of commercial Christian music broadcasts. *See* SX PFFCL ¶¶ 1385-1403. NRBNMLC's testimony to the contrary is purely theoretical and not based on any empirical analysis. *E.g.*, 8/26/20 Tr. 4048:10-14, 4048:18-20, 4049:18-23, 4050:3-8, 4051:1-5, 4051:22-4052:2, 4052:17-23 (Steinberg).

Thus, it is easy to see how a large noncommercial Christian music webcaster's pursuit of mission can place it in competition with a commercial webcaster "simply by growing large because of its popularity." 8/20/20 Tr. 3275:4-3276:16 (Cordes). In fact, there is direct evidence of competition between noncommercial religious webcasters and commercial services. *See* SX PFFCL ¶¶ 1404-13. In an unregulated market, a record company would be mindful of actual or potential competition and be motivated to support the webcaster that would generate more revenue for the record company. As a result, it would not offer a large noncommercial webcaster a discounted rate that would provide it an advantage against a competitive commercial webcaster. *See id.* ¶¶ 1414-18; *Intercollegiate Broad. Sys.*, 574 F. 3d at 768 ("[C]ompetition certainly would affect the actions of a willing seller.").

Response to ¶ 90. SoundExchange incorporates its response to ¶ 89 *supra*.

C. NRBNMLC Has Not Established That Willing Sellers Would Grant Larger Discounts to Large Noncommercial Webcasters

Response to ¶ 91. Neither Dr. Steinberg nor Dr. Cordes appears to appreciate the degree to which large noncommercial webcasters *already* pay lower royalties than commercial services under the current statutory rate structure. Ex. 5603 ¶ 148 (Orszag WRT). They receive substantial effective rate discounts, and would continue to do so under SoundExchange's rate proposal. *See* SX PFFCL ¶¶ 1419-23; *Intercollegiate Broad. Sys.*, 574 F. 3d at 764 ("a huge discount"). For example, EMF, [[redacted]], receives an effective rate discount of about [[redacted]] off of commercial rates, and would continue to do so under SoundExchange's rate proposal. *See* SX PFFCL ¶¶ 1426-27. Family Radio, [[redacted]], receives an effective rate discount of about [[redacted]] off of commercial rates, and would continue to do so under SoundExchange's rate proposal. *See id.* ¶¶ 1424-25.

NRBNMLC has not provided any evidence suggesting that a different discount level would be more appropriate. For example, it did not present any empirical evidence of the relative demand elasticities of commercial and noncommercial webcasters. Ex. 3061 ¶ 24 (Cordes CWDT). However, "economic logic dictates" that "the Judges apply commercial rates to noncommercial webcasters above the ATH threshold." *Web IV*, 81 Fed. Reg. at 26395; *see* SX PFFCL ¶¶ 1375-78; *supra* Resp. to ¶ 44.

Response to ¶¶ 92-94. SoundExchange incorporates its response to ¶ 91 *supra*.

Response to ¶ 95. While record companies may be able to identify noncommercial and commercial webcasters, they do not distinguish between the two when negotiating licenses. *See* SX PFFCL ¶ 1378.

Response to ¶ 96. SoundExchange incorporates its response to ¶ 91 *supra*.

Response to ¶ 97. The issue is not transfer of noncommercial rights to commercial entities, but diversion of potential commercial listeners to noncommercial services. Because of the potential for such diversion, "economic logic dictates" that "the Judges apply commercial rates to noncommercial webcasters above the ATH threshold." *Web IV*, 81 Fed. Reg. at 26395; *see* SX PFFCL ¶¶ 1375-78; *supra* Resp. to ¶ 44.

Response to ¶ 98. SoundExchange incorporates its response to ¶ 91 *supra*.

Response to ¶ 99. SoundExchange incorporates its responses to ¶¶ 89, 91 *supra*.

Response to ¶ 100. Discounts provided to certain nonprofit organizations by a handful of arbitrarily-selected vendors do not provide evidence that record companies would price discriminate between commercial and noncommercial webcasters to a greater extent than the current statutory royalty rate structure already does. *See* SX PFFCL ¶¶ 1454-66. The Slack discount cited by NRBNMLC is not available to noncommercial religious broadcasters. Ex. 3067 at 2 (organizations that "[p]romote a particular religious affiliation" are ineligible). The examples given are generally for technology products. Even if NRBNMLC had tried to assess technology product discounts in a systematic way (and it did not), there is no reason to believe that discount levels for technology products would be a good benchmark for sound recording discounts. *See* SX PFFCL ¶¶ 1456-57. Further, discounts may be targeted to smaller non-profit organizations or may not be proportionally extended to large non-profits. *Id.* ¶¶ 1458-62.

Response to ¶ 101. SoundExchange incorporates its response to ¶ 100 *supra*.

Response to ¶ 102. The current statutory royalty rate structure provides substantial effective rate discounts for *all* noncommercial webcasters. *See supra* Resp. to ¶ 91. However, the sellers in the hypothetical market for licensing noncommercial webcasters are individual copyright owners. *See infra* Resp. to ¶ 121. SoundExchange's settlement with CBI largely replicates the

current statutory royalty rate structure (albeit with a higher minimum fee). Ex. 3019. And SoundExchange's agreement with CPB/NPR is not an appropriate benchmark for setting rates for other noncommercial webcasters. *See* SX PFFCL ¶¶ 1482-1529; *infra* Resp. to ¶¶ 119-85. Among other things, NPR-affiliated noncommercial radio stations do not actually pay any statutory royalties, because their royalties are paid with federal government funding through CPB. *See* SX PFFCL ¶ 1497.

D. There Is No Basis for Distinguishing between Simulcasters and Other Webcasters

Response to ¶ 103. After 20 pages of arguments about allegedly distinctive features of noncommercial webcasters, NRBNMLC now remarkably pivots to an argument that noncommercial broadcasters are similar to commercial broadcasters for some of the same reasons. As addressed elsewhere, commercial simulcasters should pay the same rates as other commercial webcasters. *See id.* ¶¶ 1062-1291; SX Reply to NAB PFFCL ¶¶ 20-206. NRBNMLC's linking of noncommercial broadcasters to commercial broadcasters highlights why, in a free market, large noncommercial religious broadcasters would pay the same rates for usage above the 159,140 ATH per month threshold as commercial webcasters.

Broadcasters simulcast to make their services available on digital devices and protect erosion of their audiences due to competition from other services. *See* SX PFFCL ¶¶ 1067-79. Documents produced by NRBNMLC in discovery show that noncommercial webcasters are also concerned about competition. *See id.* ¶ 1410. Because of competition, record companies would not price discriminate in favor of simulcasting by either commercial broadcasters or large noncommercial broadcasters. *See id.* ¶ 1080.

Family Radio's strategy of migrating away from its aging and expensive terrestrial broadcast infrastructure and using webcasting to reach its audience underscores the Judges' *Web*

II finding that because of webcasting, noncommercial broadcasters "no longer necessarily face a limited geographic audience," but instead "may compete with commercial webcasters even 'worldwide.'" *Web II*, 72 Fed. Reg. 24098. Once Family Radio divested its Buffalo, NY station, Buffalo was no longer its local terrestrial radio market. Instead, Buffalo listeners who tuned into an out-of-market Family Radio webcast easily could have chosen to listen to a commercial religious broadcaster's simulcast or Pandora. *See* SX PFFCL ¶ 1430; *supra* Resp. to ¶ 43.

Response to ¶ 104. Besides the self-interested testimony of a few broadcaster fact witnesses, NRBNMLC cites no evidence that broadcasters' ability to reach listeners over-the-air without paying sound recording royalties exerts downward pressure on the rates they are willing to pay for webcasting. To the contrary, because radio broadcasters pay no sound recording royalties for their over-the-air broadcasts, they enjoy cost savings relative to internet-only webcasters and pay very low proportions of their revenue and expenses for music rights. *See* SX PFFCL ¶¶ 1105-09. Noncommercial simulcasters fare even better than their commercial brethren, with the five largest paying as statutory royalties only [redacted] of their total expenses, [redacted] of their program expenses, and [redacted] of their revenue. Ex. 5605, App. 3 (Tucker CWRT).

Response to ¶ 105. As in past proceedings, the Services have not presented any evidence that the public interest requirement applicable to radio broadcasters has any effect on the royalty rates that willing buyers and sellers would agree to in the hypothetical market. *Web IV*, 81 Fed. Reg. at 26321; *see* SX PFFCL ¶¶ 1135-39.

Response to ¶ 106. The mere fact that simulcasters offer non-music programming along with music programming is irrelevant when statutory royalties are assessed on a per-performance basis. *Web IV*, 81 Fed. Reg. at 26321; *see* SX PFFCL ¶¶ 1115-16.

Response to ¶ 107. Simulcasters' use of non-music programming does not show that the music they play is valued less than the music played by other commercial webcasters. *See* SX PFFCL ¶¶ 1115-30; SX Reply to NAB PFFCL ¶¶ 165-73.

Response to ¶ 108. The Services have not presented any evidence that local issue reporting, community programming, and on-air personalities justify lower rates for simulcasting. *See* SX PFFCL ¶¶ 1135-40.

Response to ¶ 109. SoundExchange incorporates its response to ¶ 108 *supra*.

Response to ¶ 110. The Services' allegations concerning interactivity, promotional value, use of non-music content and other asserted differences between simulcasting and other services must also be rejected. *See* SX PFFCL ¶¶ 1131-47; SX Reply to NAB PFFCL ¶¶ 1-9, 146-73.

IV. BENCHMARKING IS A USEFUL TOOL WHEN A COMPARABLE BENCHMARK EXISTS AND CAN BE ADJUSTED TO REFLECT DIFFERENCES BETWEEN THE BENCHMARK MARKET AND THE TARGET MARKET

Response to ¶ 111. Benchmarking is a useful and often-used approach to setting rates in proceedings like this one. *See* SX PFFCL ¶¶ 65-67. Indeed, benchmarking is an approach that SoundExchange proposes using in this proceeding to set the royalty rates for noncommercial webcasters for usage above the 159,140 ATH threshold that the Judges developed in *Web II* and that has found wide acceptance as a reasonable "proxy for assessing the convergence point between Noncommercial Webcasters and Commercial Webcasters in order to delineate a distinct noncommercial submarket in which willing buyers and willing sellers would have a meeting of the minds that would result in a lower rate than the rate applicable to the general commercial webcasting market." *Web II*, 72 Fed. Reg. at 24100; *see* SX PFFCL ¶¶ 65-551.

SoundExchange has not identified a suitable marketplace benchmark for noncommercial webcasting below the 159,140 ATH threshold. Neither has it identified a marketplace agreement

calling that threshold into question by suggesting that in a free market, the largest noncommercial webcasters would pay royalties at rates other than those paid by commercial webcasters for usage above that threshold. *See* SX PFFCL ¶¶ 1375-80; *Web IV*, 81 Fed. Reg. at 26395 ("[T]he Judges apply commercial rates to noncommercial webcasters above the ATH threshold because economic logic dictates that outcome, not because it was observed in benchmark agreements."). While it is not a marketplace benchmark—it is a settlement of an administrative ratesetting proceeding—SoundExchange's settlement with CBI in this proceeding indicates that the 159,140 ATH threshold continues to have acceptance. *Web IV*, 81 Fed. Reg. at 26393 (pointing to then-current CBI agreement as evidence of acceptance of 159,140 ATH threshold); SX PFFCL ¶ 1364.

There are no suitable marketplace benchmarks specific to noncommercial webcasters because there is no marketplace for licensing noncommercial webcasters. *See* SX PFFCL ¶ 1344; *see also* 9/2/20 Tr. 5394:25-5395:8 (Piibe); 9/3/20 Tr. 5599:9-16 (Adadevoh). Noncommercial webcasters of all sizes have always been content to rely on the statutory license. *See* Ex. 5625, App. A ¶ 33 (Bender WDT) (903 noncommercial statutory licensees in 2018, plus college broadcasters and public radio); Ex. 5625 ¶ 43 (Ploeger WRT) (no indication that even EMF has sought direct licenses). For their part, copyright owners would have no interest in talking with noncommercial webcasters about rate discounts if they were approached. *See* SX PFFCL ¶ 1378.

In situations such as this, it sometimes is just not possible to find a benchmark specific to a particular segment of statutory license usage that is sufficiently comparable to the hypothetical target market to be usable in a benchmarking analysis. *See Web IV*, 81 Fed. Reg. at 26394 (rejecting use of rate settlement between SoundExchange and CPB/NPR as benchmark to set noncommercial webcaster rates); *Web II*, 72 Fed. Reg. at 24098-99 (same); *see also SDARS III*, 83 Fed. Reg. at

65220-21 (rejecting use of rate settlement for so-called CABSAT services as benchmark to set rates for PSS).

Fortunately, it has not been necessary to find a benchmark for setting statutory royalties for noncommercial webcasting below the 159,140 ATH threshold, because the Judges have always subsumed that usage into a minimum fee set at a level that merely ensures all statutory licensees make a reasonable contribution to the costs of administering the statutory license, and that approach has found wide acceptance. *See* SX PFFCL ¶¶ 1349-64. SoundExchange proposes keeping that structure, although it proposes increasing the minimum fee to among other things reflect increases in its administrative costs over time. *See Id.* at ¶¶ 1530-66.

Response to ¶ 112. The Judges have used a mix of benchmarking and modeling approaches in setting statutory royalty rates, depending on the evidence before them. *See, e.g.*, *Phonorecords III*, 84 Fed. Reg. at 1947-54 (looking to Shapley analysis to set statutory mechanical royalty rates); *SDARS III*, 83 Fed. Reg. at 65210 (relying "most heavily" on opportunity cost to set SDARS rates); *Web IV*, 81 Fed. Reg. at 26353, 26374-75 (using benchmarking to set webcasting statutory royalty rates). SoundExchange proposes using both approaches to set statutory royalty rates for commercial webcasters and for noncommercial webcasters with usage in excess of the 159,140 ATH threshold. *See* SX PFFCL ¶¶ 65-842.

Response to ¶ 113. SoundExchange incorporates its response to ¶ 111 *supra*.

Response to ¶ 114. There is no dispute that in a proceeding like this, the statute permits the Judges to rely on a direct agreement between a sound recording copyright owner and a statutory webcaster—like the agreement between WMG and iHeart relied upon in *Web IV*, or the decision of an individual independent record company to opt into the Pandora/Merlin agreement relied on in *Web IV*. 81 Fed. Reg. at 26355-88. However, nobody has identified such an agreement involving

a noncommercial webcaster. *Supra* Resp. to ¶ 111. The settlement between SoundExchange and CPB/NPR is not such an agreement. *See* SX PFFCL ¶¶ 1492-93; *infra* Resp. to ¶ 121.

Response to ¶ 115. SoundExchange agrees that no adjustment for promotion/substitution or relative contributions is warranted if the Judges set rates for noncommercial webcasters with usage in excess of the 159,140 ATH threshold based on Mr. Orszag's benchmarking approach. *See* SX PFFCL ¶¶ 57, 505-51. The same is true if the Judges set rates for noncommercial webcasters with usage in excess of the 159,140 ATH threshold based on Professor Willig's Shapley approach. *See Id.* at ¶¶ 566-70.

Response to ¶ 116. SoundExchange incorporates its response to ¶ 115 *supra*.

Response to ¶ 117. SoundExchange incorporates its responses to ¶¶ 111-12 *supra*.

Response to ¶ 118. SoundExchange incorporates its response to ¶ 111 *supra*.

V. AS IN *WEB II* AND *WEB IV*, THE JUDGES MUST AGAIN REJECT NRBNMLC'S ATTEMPT TO USE A SETTLEMENT BETWEEN SOUNDEXCHANGE AND CPB/NPR AS A BENCHMARK FOR SETTING RATES FOR OTHER NONCOMMERCIAL WEBCASTERS

A. SoundExchange's Settlement with CPB/NPR Is Not a Comparable Benchmark for Purposes of Setting Rates for Other Noncommercial Services

1. NRBNMLC Has Made Only a Superficial Effort to Assess the Comparability of SoundExchange's Settlement with CPB/NPR as a Benchmark

Response to ¶ 119. No response.

Response to ¶ 120. There is no dispute that "'comparability' is a key issue in gauging the relevance of any proffered benchmarks." *SDARS I*, 73 Fed. Reg. at 4088. However, after numerous proceedings before the Judges in which they carefully assessed the comparability of proposed benchmarks, NRBNMLC sources its standard of comparability in a twenty year old litigation position taken by RIAA, when that litigation position was largely rejected. In *Web I*, the CARP closely scrutinized the 26 agreements proffered by RIAA as benchmarks, noted significant

problems with reliance on them, and in the end gave weight to only one of them. *Web I* CARP Report, at 45-60. Like the *Web I* CARP, the Judges have carefully scrutinized the proposed benchmarks advocated by the participants in rate proceeding proceedings before them. Thus, for example, the Judges have found settlements between SoundExchange and CPB/NPR to be non-comparable both previous times when NRBNMLC has proffered them as benchmarks. *See* SX PFFCL ¶¶ 1354, 1363.

Response to ¶ 121. NRBNMLC's economic expert Professor Cordes does not advocate SoundExchange's settlement with CPB/NPR as a potential benchmark. He identified SoundExchange's agreement with CBI as a potential benchmark. Ex. 3061 ¶¶ 33-36 (Cordes CWDT). Professor Steinberg increasingly embraced the CPB/NPR settlement as a benchmark over the course of the proceeding, because he concluded that it provided a better rationale than RIAA's *Web I* rate proposal for the one-third of commercial rate that he advocated from the beginning. *See* SX PFFCL ¶¶ 1473-74. However, it was not apparent at the time SoundExchange filed its written rebuttal statement that NRBNMLC was even proposing a CPB/NPR benchmark, which limited SoundExchange's ability to respond and makes it unfair and inappropriate to rely on a CPB/NPR settlement benchmark. *See infra* Resp. to ¶ 241. In any event, Professor Steinberg failed to assess the comparability of the CPB/NPR agreement as a benchmark beyond the shallow observation that NPR stations are noncommercial entities. *See* SX PFFCL ¶¶ 1473-91.

Because neither of NRBNMLC's economic experts conducted a meaningful analysis of the comparability of SoundExchange's settlement with CPB/NPR to the hypothetical market for which the Judges must set rates in this proceeding, NRBNMLC advocates only a superficial assessment of comparability that is solely the work of counsel for NRBNMLC. It is essentially the same

argument that counsel for NRBNMLC made to the D.C. Circuit in NRBNMLC's appeal of the *Web II* decision, which the Court rejected. *Intercollegiate Broad. Sys.*, 574 F. 3d at 764-66.

The hypothetical market for which the Judges must set rates in this proceeding is one "not constrained by a statutory license." *Web II*, 72 Fed. Reg. at 24091. Yet NRBNMLC never even acknowledges the possibility of differences between the CPB/NPR settlement and the target market because the former is a settlement of a regulatory proceeding. *See infra* Resp. to ¶ 149.

In that hypothetical market, "the willing buyers are the services which may operate under the webcasting license (DMCA-compliant services), the willing sellers are record companies and the product consists of a blanket license for each record company which allows use of that record company's complete repertoire of sound recordings." *Web II*, 72 Fed. Reg. at 24091 (quoting *Web I*, 67 Fed. Reg. 45244); *see also* JPFFCL ¶ 2. It is obvious that there are significant differences between SoundExchange's settlement with CPB/NPR and the target market.

(a) **Different buyers** – In SoundExchange's settlement with CPB/NPR, the buyer is CPB, an entity that does not webcast and is not included among the "Originating Public Radio Stations" that may rely on the license it is paying for. Ex. 3020 at 6. It is providing federal government funding for the statutory royalties covered by the settlement and it has market power that an individual station would not have. *Id.* at 2; *see* SX PFFCL ¶¶ 1497-98. Even if the buyer were considered to be a consortium of NPR stations that are not paying for the rights acquired, that is not the same as having the buyer be the operator of one statutory service. SX PFFCL ¶¶ 1493-94. Further, there are significant differences between individual NPR stations and large noncommercial religious broadcasters (the ones that pay more than the minimum fee). *See id.* at ¶¶ 1495-1503.

(b) **Different sellers** – It is SoundExchange, Inc. that concluded the settlement agreement with CPB/NPR in this proceeding. Ex. 3020 at 1. SoundExchange, Inc. is not a sound recording copyright owner; it is the collective that administers the statutory license for artists and copyright owners. Ex. 5625, App. A ¶ 4 (Bender WDT). In that role it sometimes makes pragmatic judgments about when it makes more sense to settle with a particular licensee group than litigate with them. Ex. 5625 ¶ 15 (Ploeger WRT). However, NRBNMLC did not address whether, and has not provided any reason to believe that, a price reflective of SoundExchange's litigation judgments is a good proxy for the price that would be agreeable to a record company licensing its works in a free market "not constrained by a statutory license." *Web II*, 72 Fed. Reg. at 24091; *infra* Resp. to ¶ 149.

(c) **Different sets of works** – While both SoundExchange's settlement with CPB/NPR and the hypothetical market are concerned with sound recordings, SoundExchange's settlement with CPB/NPR includes a different scope of sound recordings than in the target market, because it is a settlement of a statutory rate proceeding, and so covers all commercial sound recordings, rather than one record company's repertoire. *See* Ex. 3020 at 1.

(d) **Different rights and obligations** – SoundExchange's settlement with CPB/NPR applies to use of recordings in statutory services, since it is a settlement of a statutory royalty rate proceeding. *See id*. However, in *SDARS III* the Judges applied much more rigorous scrutiny to SoundExchange's effort to use a settlement of a statutory royalty rate proceeding as a benchmark. Even though both the PSS services for which the Judges were setting rates and the CABSAT services SoundExchange proposed as a benchmark were both statutory services, and even though the services were functionally the same, the Judges perceived the possibility that the PSS might need additional rights not conveyed by the CABSAT rate structure, such as the ability to make

internet transmissions to the home, and on that basis found the CABSAT benchmark non-comparable. *SDARS III*, 83 Fed. Reg. at 65220-21. Similarly here, SoundExchange's settlement with CPB/NPR is conditioned on up-front payment of annual lump sums, which is not present in NRBNMLC's proposed Alternative 1, as well as consolidated reporting, which is not present in either of NRBNMLC's proposed Alternative 1 or Alternative 2. These are significant items of value to SoundExchange that NRBNMLC does not account for. *See* SX PFFCL ¶¶ 1496, 1504-05, 1523-27; *infra* Resp. to ¶¶ 154, 155, 159, 161, 176-81.

2. Using SoundExchange's Settlement with CPB/NPR as a Benchmark Is Far Inferior to the Approach the Judges Have Previously Used When Setting Rates for Noncommercial Webcasters

Response to ¶ 122. SoundExchange's rate proposal for noncommercial webcasters mirrors the existing rate structure for noncommercial webcasters and is fully justified by the Judges' past determinations and evidence adduced by SoundExchange in this proceeding. About 97% of noncommercial webcasters have usage below the 159,140 ATH per month threshold, and they would pay only the minimum fee under SoundExchange's rate proposal. These low-usage noncommercial webcasters receive up to a 99% discount from commercial rates. *See* SX PFFCL ¶¶ 1366-71. One could hardly do more to accommodate a perceived difference in willingness to pay by noncommercial webcasters. The 20 large noncommercial webcasters with usage in excess of the 159,140 ATH per month threshold also receive substantial discounts that accommodate a perceived difference in willingness to pay by noncommercial webcasters; they simply receive less of a discount than the smallest noncommercial webcasters. *See id.* ¶¶ 1419-27; *Intercollegiate Broad. Sys.*, 574 F. 3d at 764 ("a huge discount").

Because there is no reason to believe copyright owners would, in a free market, give well-resourced licensees that compete with commercial licensees bigger discounts than they already get, SX PFFCL ¶¶ 1372-1414, the most reasonable approach is to continue using a commercial

benchmark to set a rate for usage by large noncommercial webcasters in excess of the 159,140 ATH threshold. Certainly SoundExchange's settlement with CPB/NPR does not provide a reliable means of determining whether large noncommercial webcasters should receive a different effective rate discount than they now get. *Supra* Resp. to ¶¶ 120-21. A benchmark by definition will differ from the target market in some respects. The questions are whether a proposed benchmark is sufficiently comparable to be usable, and if so, whether it can be adjusted to account for the differences. *See* SX PFFCL ¶ 68. NRBNMLC's proposed CPB/NPR benchmark is non-comparable, and NRBNMLC has made no effort at adjustment other than in the case of NRBNMLC's Alternative 2, extending the CPB/NPR settlement proportionally to a higher volume of usage without regard to whether that is appropriate. *See id.* ¶¶ 1482-1529. By contrast, other participants in this proceeding have exhaustively debated the comparability of, and potential adjustments to, the other benchmarks proffered in this proceeding. *See id.* ¶¶ 65-551.

As the proponent of a significant change in the statutory rate structure for noncommercial webcasters, NRBNMLC has the burden of coming forward with sufficient evidence to support its proposed change. *See Web IV*, 81 Fed. Reg. at 26320. The Judges have "no duty to compensate" for shortcomings in NRBNMLC's benchmark. *Intercollegiate Broad. Sys.*, 574 F. 3d at 765. NRBNMLC's efforts to resuscitate a proposed CPB/NPR benchmark that the Judges have twice rejected do not meet that burden. *See* SX PFFCL ¶¶ 1467-1529. It would be unreasonable to expect SoundExchange to have the burden of coming forward with evidence of *non*-comparability, when it was not apparent at the time SoundExchange filed its written rebuttal statement that NRBNMLC was meaningfully proposing a CPB/NPR benchmark. *See infra* Resp. to ¶ 241.

Response to ¶ 123. After three prior decisions by the Judges adopting a royalty rate structure for noncommercial webcasters where usage over the 159,140 ATH threshold is paid for

at commercial rates, NRBNMLC's citation to the earlier *Web I* CARP decision provides no reason for the Judges to change course. *See* SX PFFCL ¶¶ 1349-63. Further, the *Web I* CARP adopted a very different rate structure than has been in place since *Web II*, one that did not include a block of 159,140 ATH per month of usage at up to a 99% discount from commercial rates before noncommercial webcasters were obligated to pay per-performance royalties. Ex. 5603 ¶ 168 (Orszag WRT). Thus, even though the current rate structure includes a commercial rate component, it is actually *more favorable to licensees* than the *Web I* rate structure—even with payment of full commercial rates on usage over the 159,140 ATH threshold—except for the noncommercial webcasters with the very highest usage who are most likely to compete meaningfully with commercial services. For example, [ ]. In 2018, it paid [ ] in statutory royalties, consisting of [ ] in minimum fees and [ ] in per-performance royalties. Ex. 5625, App. E (Ploeger WRT). If it had paid under the *Web I* rate structure with a per-performance rate of $0.0006 per-performance (one third of the 2018 commercial rate) from its first performance, it would have paid about [ ].[3]

Response to ¶ 124. As the Judges have held multiple times, noncommercial webcasters represent a separate submarket only "up to a point." *Web IV*, 84 Fed. Reg. at 26392 (quoting *Web II*, 72 Fed. Reg. at 24097). It is self-evident that "if you play more music [than] play less music, you're more likely to take away share from somebody who is playing the same music." 8/13/20 Tr. 1995:5-8 (Orszag); *Web II*, 72 Fed. Reg. at 24098 ("Music programming found on noncommercial stations competes with similar music programming found on commercial

[3] This estimate includes an estimated 22,916,160 performances included with the minimum fee (calculated as 159,140 ATH × 12 month × 12 performances per ATH) plus [ ] performances for which [ ] paid per-performance royalties (calculated as [ ] ÷ $0.0018), for a total of [ ] performances payable at a hypothetical $0.0006 per-performance rate. *See* Ex. 5625 ¶ 40 (Ploeger WRT).

stations."). NRBNMLC's expert, Professor Cordes, acknowledged as much in response to a question from Judge Strickler, agreeing that even if a noncommercial webcaster did not set out to compete with a commercial webcaster, the noncommercial webcaster could nonetheless compete with a commercial webcaster "simply by growing large because of its popularity." 8/20/20 Tr. 3275:4-3276:16 (Cordes).

There is strong evidence of competition between noncommercial religious webcasters and commercial webcasters. *See* SX PFFCL ¶¶ 1381-1414. Thus, one would expect that in willing buyer/willing seller negotiations, record companies would be mindful of the potential for competition between commercial webcasters and large noncommercial webcasters, as the Judges have consistently found, and not give large noncommercial webcasters large discounts. Ex. 5603 ¶¶ 155, 162 (Orszag WRT); *Intercollegiate Broad. Sys.*, 574 F. 3d at 768 ("[C]ompetition certainly would affect the actions of a willing seller."). As a result, it is entirely reasonable to use a comparable and properly-adjusted commercial benchmark to set a commercial rate that noncommercial webcasters will pay on usage over the 159,140 ATH per month threshold. *See* SX PFFCL ¶¶ 1349-63.

Response to ¶ 125. Professor Willig's opportunity cost and modeling approach is also instructive for setting noncommercial webcaster royalty rates, because a licensor would not normally be expected to sell below its opportunity cost, and the Shapley Value is a well-recognized tool that is consistent with the Judges' mandate for this proceeding. *See id.* ¶¶ 564-68. Perhaps a licensor would not care about noncommercial use that is so *de minimis* as to not raise material competitive concerns, *see id.* ¶ 1416, or would be willing to charge less than its cost on a limited basis for eleemosynary reasons, *see* Ex. 3062 ¶ 61 (Burkhiser WDT) (describing donation of a piano), but the economics of licensing commercial services would certainly affect a copyright

owner's thinking about licensing a large noncommercial service. *Supra* Resp. to ¶ 124; *infra* Resp. to ¶ 152; Ex. 5609 ¶ 80 (Harrison WDT) (UMG would not be interested in pursuing a direct license with a noncommercial webcaster except at market rates). NRBNMLC's non-comparable CPB/NPR benchmark is not a better source of information. *Supra* Resp. to ¶¶ 120-21.

Response to ¶ 126. NRBNMLC's reference to the Judges' past uses of SoundExchange's settlement with CBI, without identifying it as a CBI settlement, is misleading. SoundExchange has a history of settlements with CBI that are consistent with the current statutory royalty rate structure. *See* SX PFFCL ¶¶ 1355, 1357, 1364. The Judges have repeatedly cited those settlements for confirmation that the market accepts the current statutory royalty rate structure, including the 159,140 ATH per month threshold. *Web IV*, 81 Fed. Reg. at 26393; *Web III Remand*, 79 Fed. Reg. at 23123. Professor Cordes even advocated using SoundExchange's agreement with CBI as a potential benchmark in this proceeding. Ex. 3061 ¶¶ 33-36 (Cordes CWDT). However, the Judges have repeatedly rejected reliance on SoundExchange's settlements with CPB/NPR when NRBNMLC has proposed using them as benchmarks. *See* SX PFFCL ¶¶ 1354, 1363. The Judges' decision-making is thus much more nuanced than simply reasoning from any prior settlement that happens to involve noncommercial webcasters. Here, there are significant differences between large noncommercial religious broadcasters and NPR stations, and significant differences between the CPB/NPR settlement and the rate structures proposed by NRBNMLC, which NRBNMLC simply ignores. *Supra* Resp. to ¶¶ 120-21.

Response to ¶ 127. A benchmark may only be relied upon for ratesetting if it is sufficiently comparable and properly adjusted to account for any differences between the benchmark market and the hypothetical target market. *See* SX PFFCL ¶¶ 68, 1488. The CPB/NPR settlement is non-comparable. *See id.* at ¶¶ 1482-1505, 1515-27; *supra* Resp. to ¶¶ 120-21. Among other things, the

record reflects significant potential for diversion of listenership from commercial religious broadcasters to noncommercial religious broadcasters playing contemporary Christian music, but no indication that NPR stations are equally substitutional for commercial services. SX PFFCL ¶¶ 1499-1503; *infra* Resp. to ¶¶ 137, 198. Thus, it cannot simply be assumed that it is reasonable to use the CPB/NPR settlement to avoid the need to rely on other evidence, such as the CBI settlement and economic theory that the Judges have relied on previously when setting rates for noncommercial webcasters. *See* SX PFFCL ¶¶ 1350-53, 1356, 1361-62.

Response to ¶ 128. Agreements between individual record companies and individual noncommercial providers of on-demand services might well be interesting benchmarks if they existed, but they do not exist. *See* SX PFFCL ¶ 1344; *supra* Resp. to ¶ 111. Given that, and consistent with past decisions by the Judges, it is appropriate to use commercial benchmarks to set commercial rates to be paid by noncommercial webcasters for usage above the 159,140 ATH threshold, because "expert economic testimony supports treating transmissions by noncommercial webcasters above a certain ATH threshold the same as transmissions by commercial webcasters." *Web IV*, 81 Fed. Reg. at 26394; *see also id*. at 26395 ("[T]he Judges apply commercial rates to noncommercial webcasters above the ATH threshold because economic logic dictates that outcome."); *Web II*, 72 Fed. Reg. at 24098; SX PFFCL ¶¶ 1375-80, 1411-18. It is likewise irrelevant that Professor Willig did not specifically consider noncommercial services. "[E]conomic logic dictates" that noncommercial services with a high level of usage pay the same rates as commercial services. *Web IV*, 81 Fed. Reg. at 26395.

Response to ¶ 129. Professor Tucker's testimony concerning noncommercial webcasters focused on assessing the effects of the current statutory royalty rate structure and SoundExchange's rate proposal. What she found is that the current statutory structure *always*

results in an effective rate discount for noncommercial webcasters, and that statutory royalties are not material to the finances of the large noncommercial webcasters that pay the vast majority of noncommercial statutory royalties. *See* SX PFFCL ¶¶ 1421, 1433-34.

Response to ¶ 130. The Judges decided the *Web IV* rates, not SoundExchange, based on their assessment of the evidence before them of what rates "most clearly represent" what "would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(1)(B); *see Web IV*, 81 Fed. Reg. at 26394-95. NRBNMLC did not appeal their decision. *See SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41 (D.C. Cir. 2018). As the proponent of a significant change in the statutory rate structure, NRBNMLC has the burden of coming forward with sufficient evidence to support its proposed change. *See Web IV*, 81 Fed. Reg. at 26320. Professor Steinberg's recognition that the Judges' based their *Web IV* decision on SoundExchange's rate proposal is not sufficient to meet that burden. *See infra* Resp. to ¶ 186.

3. The Unique Government Funding of the CPB/NPR Settlement Reinforces That It Is Not a Suitable Benchmark

Response to ¶ 131. NRBNMLC's proposed CPB/NPR benchmark is non-comparable to the hypothetical target market for many reasons. *See* SX PFFCL ¶¶ 1482-1505, 1515-27; *supra* Resp. to ¶¶ 120-21. One of them is the unique funding structure whereby CPB pays the statutory royalties for public broadcasters with federally-appropriated dollars. Ex. 3020 at 2; *see* SX PFFCL ¶¶ 1497-98; *supra* Resp. to ¶ 121. This creates a mismatch between the proposed benchmark and the hypothetical target market, because the buyer is not an individual webcaster paying with its own money, and raises a question of whether and how one might account for that difference. *See id*. Professor Steinberg asserted that the CPB is more likely to spend government money freely than a large noncommercial webcaster would spend its own money, because of its stable funding,

suggesting that the rates implied by the CPB/NPR benchmark should perhaps be adjusted down "a little." 8/26/20 Tr. 4040:1-5 (Steinberg).

As a threshold matter, even if Professor Steinberg were right about this particular point (and he is not), the proffered CPB/NPR benchmark cannot be relied on without establishing its comparability and addressing all the differences between it and the target market. *See* SX PFFCL ¶¶ 1482-1505, 1515-27; *supra* Resp. to ¶¶ 120-21.

Further, other than his *ipse dixit*, Professor Steinberg provides no reason to believe that the proper direction for an adjustment based on funding source is downward. The objective facts are to the contrary. The large noncommercial webcasters that pay more than the minimum fee are well-resourced organizations with the willingness and ability to pay material royalties. *See* SX PFFCL ¶¶ 1429-33. For example, in 2018, EMF generated a financial surplus almost $55 million. Ex. 5238 at 6. This appears to be a stable pattern. In 2015, it generated a financial surplus of over $57 million and in 2016 it generated a financial surplus of over $63 million. Ex. 5473 at 1. Even Family Radio, which has run losses in recent years because of its unique circumstances, *see* SX PFFCL ¶¶ 1441-47, has had "steady donations of about 5 million dollars each year," 8/31/20 Tr. 4795:14-17 (Burkhiser). The financial evidence in the record simply does not support Professor Steinberg's speculation that large religious broadcasters' funding sources are unstable as compared to CPB.

Response to ¶ 132. CPB is no doubt a substantial and well-resourced organization as well, although in 2015 and 2016 (the only years for which a comparison is possible with the evidence in the record), CPB's financial surplus was less than EMF's. *Compare* Ex. 5473 at 1 *with* Ex. 3065 at 1. Further, under the CPB/NPR settlement, CPB is buying for up to 530 individual stations, which would buy individually in the hypothetical target market. *See* Ex. 3020 at 7; *supra* Resp. to

¶ 121. That gives CPB the kind of market power that the government typically enjoys because it is usually a large purchaser of everything it buys. *See* SX PFFCL ¶ 1498. Professor Steinberg did not take into account the differences in market power between the buyers in the benchmark market and target market, which would require an upward adjustment in the benchmark rate.

Professor Steinberg also failed to take into account the unique political circumstances associated with CPB's use of government funding, which are called out in the settlement. Ex. 3020 at 2; *see* SX PFFCL ¶¶ 1495, 1497. As NRBNMLC trumpets in its Proposed Findings and Conclusions, noncommercial webcasters have on multiple occasions run to Congress to complain about statutory royalty rates. NRBNMLC PFFCL ¶¶ 21, 25. Because CPB is spending federally-appropriated dollars on webcasting royalties, it is reasonable to expect that CPB/NPR would find a particularly sympathetic ear if it ever were to lobby its appropriators about statutory royalty rates in the absence of a settlement. *See* SX PFFCL ¶ 1497. To the extent the CPB/NPR settlement might be informative of something, the lobbying efforts highlighted by NRBNMLC suggest that parties with more political clout should be able to settle rate proceedings at lower prices than parties with less political clout.

Response to ¶ 133. NRBNMLC grossly overstates the relevance of Section 396(k)(3)(A)(i)(II), which merely authorizes that 6% of CPB's budget be used for a wide range of expenses including all royalties among things like "capital costs relating to telecommunications satellites." 47 U.S.C. § 396(k)(3)(A)(i)(II). It does not justify use of the CPB/NPR settlement as a benchmark, much less a downward adjustment thereto. *Supra* Resp. to ¶¶ 131-32. Rather, it simply underscores that CPB is using federally-appropriated funds to pay statutory royalties for NPR stations.

Response to ¶ 134. Evidence in the record shows that EMF has run financial surpluses much larger than NPR and its state affiliates Oregon Public Radio and New York Public Radio *combined*. *See* Ex. 3050 at 1 (NPR 2016 and 2017 surpluses of about $500,000 and about $8 million, respectively); Ex. 3056 at 1 (Oregon Public Radio 2017 and 2018 surpluses of about $7 million and about $8 million, respectively); Ex. 3075 at 1 (New York Public Radio 2016 surplus of about $2 million and 2017 loss of about $250,000); *supra* Resp. to ¶ 131.

Response to ¶ 135. In addition to running higher financial surpluses than Oregon Public Radio and New York Public Radio, EMF has higher revenue than Oregon Public Radio and New York Public Radio. *Compare* Ex. 5473 at 1 *with* Ex. 3056 at 1; Ex. 3075 at 1. In contrast to Professor Steinberg's sweeping theories, the objective financial information in the record shows that EMF, [ ], *see* SX PFFCL ¶ 1431, faces no impediment to paying at least as much as CPB/NPR. *Supra* Resp. to ¶¶ 131-34.

B. SoundExchange's CBP/NPR Settlement Does Not Support NRBNMLC's Proposed Royalty Rate Structures

Response to ¶ 136. No response.

Response to ¶ 137. The Judges do not have the authority to adopt NRBNMLC's proposed Alternative 2 rate structure. *See* SX PFFCL ¶¶ 1518-20. Even if the Judges did have authority to adopt that proposal, the CPB/NPR settlement does not support doing so, because the settlement is not a comparable benchmark, even if there is some similarity between the rate structures involved, and NRBNMLC has made no effort to account for differences. Among other things:

- The CPB/NPR settlement is not a suitable benchmark because it is not a marketplace benchmark (*see id.* ¶¶ 1487, 1521);

- It involves a different buyer than the hypothetical target market—CPB or perhaps NPR or a consortium of NPR stations, rather than an individual station (*see id.* ¶¶ 1493, 1497-98, 1521; *supra* Resp. to ¶¶ 131-35);
- It involves a different seller than the hypothetical target market—SoundExchange rather than an individual copyright owner (*see* SX PFFCL ¶¶ 1493, 1521);
- It involves all commercial recordings rather than one record company's recordings (*see id*.);
- NPR stations vary widely in the amount and range of music used, while the overwhelming majority of noncommercial webcaster royalties come from stations playing contemporary Christian music, focusing the impact of discounting for religious webcasters on a small number of artists and record companies (*see id.* ¶¶ 1499, 1501; *Web IV*, 84 Fed. Reg. at 26394);
- [redacted], and NRBNMLC proposes extending the CPB/NPR settlement proportionally to 50% more usage, while one would not necessarily expect discounts to be extended proportionally to larger users (*see* SX PFFCL ¶¶ 1500, 1516-17, 1522; *infra* Resp. to ¶ 152);
- The record reflects a significant risk of diversion of listenership from commercial webcasters to noncommercial religious webcasters, but no evidence that NPR stations are similarly substitutional (*see* SX PFFCL ¶ 1502);
- Despite the superficial similarity of NRBNMLC's proposed Alternative 2 rate structure to the CPB/NPR settlement, Alternative 2 does not promise the consolidated reporting and data quality assurance that is a major benefit for

SoundExchange of the CPB/NPR settlement (*see id.* ¶¶ 1504, 1523-27; *infra* Resp. to ¶¶ 176-81; *Web IV*, 84 Fed. Reg. at 26394); and

- Professor Steinberg made no effort to assess actual usage under the CPB/NPR settlement or compare it to probable usage by other noncommercial webcasters (*see* SX PFFCL ¶¶ 1510[4]-11; *Web II*, 72 Fed. Reg. at 24098).

Response to ¶ 138. The CPB/NPR settlement cannot be relied on to support NRBNMLC's proposed Alternative 1 or any other statutory royalty rate structure, because it is not a comparable benchmark to the hypothetical target market. *Supra* Resp. to ¶¶ 120-21, 137. NRBNMLC also has made no effort to translate the rate structure of the CPB/NPR settlement into its proposed Alternative 1 rate structure. Alternative 1 permits individual webcasters to make any amount of a la carte usage with no up-front commitment, while the CPB/NPR settlement features large, up-front annual fixed-fee payments. Alternative 1 thus gives licensees the benefit of flexibility that CPB does not have, while depriving SoundExchange of the advantages of the lump-sum up-front payments provided by the CPB/NPR settlement, including the time value of money and protection from bad debt and avoiding costs of processing multiple payments, and consolidated reporting. *See* SX PFFCL ¶¶ 1493, 1496, 1504-05, 1523-27; 8/26/20 Tr. 4066:24-4067:4 (Steinberg); *infra* Resp. to ¶¶ 176-81; *Web IV*, 84 Fed. Reg. at 26394; *Web II*, 72 Fed. Reg. at 24098-99. Alternative 1 also includes an annualized ATH threshold that has economic significance, is not a feature of the current rate structure, and is not a feature of the CPB/NPR settlement. *See* SX PFFCL ¶¶ 1512-14; *infra* Resp. to ¶ 158.

[4] It has come to SoundExchange's attention that SX PFFCL ¶ 1510 is inaccurate when it reports utilization of station capacity under the CPB/NPR settlement. It appears that the actual number of stations that were relying on the *Web III* CPB/NPR settlement is somewhat higher than listed in line 13 of the "[ ]" tab of Exhibit 3022, and that while [ ]. Ex. 3022 (Tab "[ ]," Line 30; Tab "[ ]," Column F).

Response to ¶ 139. SoundExchange incorporates its response to ¶ 138 *supra*.

Response to ¶ 140. Exhibit 3022 does not purport to address the *Web IV* CPB/NPR settlement. It was probably produced in [[redacted]], and what it does is [[redacted]]. *See* SX PFFCL ¶¶ 1507-08. [[redacted]]; *see* 9/9/20 Tr. 5829:16-21 (Ploeger) (referring to litigated noncommercial rates as "NCW-CRB").

The *Web III* CPB/NPR agreement was a non-precedential agreement under the Webcaster Settlement Act, 17 U.S.C. § 114(f)(4). *2009 WSA Notification*, 74 Fed. Reg. at 40621. The agreement for noncommercial webcasters was also a non-precedential agreement under the Webcaster Settlement Act. 74 Fed. Reg. at 40627. NRBNMLC flagrantly violates the Webcaster Settlement Act by trying to make an issue in this proceeding of non-precedential rates set forth in Exhibit 3022. *Supra* Resp. to ¶¶ 15-16, 21-23, 25-28, 30. The Judges are prohibited by statute from taking "any provisions" of either agreement, "including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein," into account. 17 U.S.C. § 114(f)(4)(C). Further, Congress specifically recognized that the unique "political circumstances" of the webcasters' lobbying efforts that led to the Webcaster Settlement Act, *see* NRBNMLC PFFCL ¶ 25, make agreements under the Act an unreliable indicator of "matters that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(4)(C).

Response to ¶ 141. The [ ] tab of Exhibit 3022 [ ].

See Ex. 3022 (Tab [ ]).

Response to ¶ 142. [ ]; *see also* 74 Fed. Reg.

at 40626. The Judges are prohibited by statute from taking those rates into account in this proceeding. 17 U.S.C. § 114(f)(4)(C); *supra* Resp. to ¶ 140.

Response to ¶ 143. [redacted]; *see also* 74 Fed. Reg. at 40626. The Judges are prohibited by statute from taking those rates and that rate structure into account in this proceeding. 17 U.S.C. § 114(f)(4)(C); *supra* Resp. to ¶ 140.

Response to ¶ 144-45. SoundExchange incorporates its response to ¶ 143 *supra*.

Response to ¶ 146. [redacted] During 2014-2015, CPB was obviously paying under the CPB/NPR settlement in effect at the time, and NPR stations were obviously relying on that settlement, *see* NRBNMLC PFFCL ¶ 26, [redacted]. The Judges are prohibited by statute from taking into account in this proceeding either agreement or the fees payable thereunder. 17 U.S.C. § 114(f)(4)(C); *supra* Resp. to ¶ 140.

All that Professor Steinberg's inferences from Exhibit 3022 show is that when SoundExchange entered into its CPB/NPR settlement for the *Web IV* period, [redacted]. *See* Ex. 3022 (Tab [redacted]). This realization does not transform any CPB/NPR settlement into a marketplace benchmark comparable to the hypothetical target market for licensing other noncommercial webcasters or reflect the rate

structures proposed by NRBNMLC. *Supra* Resp. to ¶¶ 120-21, 137-38. Rather, it illustrates that statutory rate settlements are negotiated in a highly constrained regulatory environment bearing little resemblance to an actual market.

The *Web IV* CPB/NPR settlement also is not informative concerning current market conditions. It was entered into in February 2015—almost six years ago. 80 Fed. Reg. 15958 (Mar. 26, 2015). In *Web IV*, the Judges rejected an effort by Sirius XM to rely on a similarly-old settlement (from *Web III*) on the basis of its age. *Web IV*, 81 Fed. Reg. at 26390.

Response to ¶ 147. What NRBNMLC refers to as "calculations under the [ ] structure" are an embodiment of [ ]. *Supra* Resp. to ¶¶ 141, 143. The Judges are prohibited by statute from taking those rates into account in this proceeding. 17 U.S.C. § 114(f)(4)(C); *supra* Resp. to ¶ 140.

However, it is correct that SoundExchange's settlements with CPB/NPR include a substantial discount reflecting both the advantages of an up-front, lump-sum payment and the shifting from SoundExchange to NPR of a great deal of work associated with the administration of the statutory license for public radio stations. The former reduces SoundExchange's costs of processing multiple payments, 8/26/20 Tr. 4066:24-4067:4 (Steinberg), and provides SoundExchange benefits associated with the time value of money and protection from bad debt. *See* SX PFFCL ¶ 1496; *Web IV*, 84 Fed. Reg. at 26394; *Web II*, 72 Fed. Reg. at 24098-99. The latter is a "major benefit that was coming out of the negotiation for SoundExchange." 8/17/20 Tr. 2232:18-25, 2233:1-15 (Tucker); *see* SX PFFCL ¶¶ 1504, 1523-26. NRBNMLC does not try to quantify these benefits for SoundExchange, and its use of the CPB/NPR settlement does not take these benefits into account.

Response to ¶ 148. For the foregoing reasons, the settlement between SoundExchange and CPB/NPR should be understood as reflecting the unique deal structure and negotiating history between the parties. That negotiating history shows SoundExchange obtaining for artists and copyright owners in settlements of regulatory proceedings increasing royalty payments in both absolute terms and on a per-ATH basis (assuming the maximum number of permitted ATH was used), while saving artists and copyright owners substantial costs through the unique payment and reporting structure under the CPB/NPR settlement. *See* NRBNMLC PFFCL ¶¶ 146, 148; *supra* Resp. to ¶ 146. The Judges should reject NRBNMLC's proposal to choose from its perceptions of the CPB/NPR settlement the elements that NRBNMLC likes, just as they have done in the past. *Web IV*, 84 Fed. Reg. at 26394 ("To pluck out a single element of the deal . . . and cite it as support for the NRBNMLC rate proposal simply lacks credibility."); *Web II*, 72 Fed. Reg. at 24098-99.

C. The CPB/NPR Settlements Are Not Marketplace Benchmarks Because They Are Settlements of Regulatory Proceedings, but NRBNMLC's Calculations Show That the Vast Majority of Noncommercial Webcasters Would Be Worse Off under the Per-ATH Pricing Implied by the CPB/NPR Settlement

Response to ¶ 149. Benchmarking analysis is a useful approach in proceedings like this because benchmarking relies on actual marketplace data. Ex. 5602 ¶ 44 (Orszag WDT). However, a settlement of a rate proceeding is not a marketplace benchmark. *SDARS III*, 83 Fed. Reg. at 65220 (citing approvingly SoundExchange's concession that a settlement of a CABSAT proceeding was "not a marketplace benchmark. It is instead a regulated rate."); *supra* Resp. to ¶¶ 111, 121. Thus, the CPB/NPR settlements are situated very differently from the WMG/iHeart and Merlin/Pandora agreements at issue in *Web IV*, which were voluntary agreements between individual licensors (WMG or independent record companies choosing to opt in to the Merlin agreement) and an individual service provider at a rate below the statutory rate. Regardless whether those agreements may be considered to have been negotiated sufficiently in the shadow of the

statutory license as to be unreliable, the CPB/NPR settlements for the *Web IV* and *Web V* eras *are the statutory license*. 85 Fed. Reg. 11857 (Feb. 28, 2020); 80 Fed. Reg. 59588 (Oct. 2, 2015). As such, they reflect not only their negotiating history and the parties' valuations of the elements of the deal, but also considerations such as the parties' predictions of litigation outcomes and potential savings of litigation costs, *Web III Remand*, 79 Fed. Reg. at 23113, and the potential for a party dissatisfied with a litigation outcome to seek redress from Congress. *Supra* Resp. to ¶ 132. NRBNMLC cites no evidence permitting the Judges to disentangle those considerations.

Be that as it may, the very different rate structures under the CPB/NPR settlement and the current statutory royalty rate structure also make meaningful comparisons of relative discounts difficult. *See Web IV*, 84 Fed. Reg. at 26394; *Web II*, 72 Fed. Reg. at 24098-99. NRBNMLC's counsel (not its economic experts) suggest making such a comparison based on average per-ATH pricing (assuming maximum usage under the CPB/NPR settlement), even though that is not the payment metric under either the CPB/NPR settlement or the current statutory royalty rate structure. NRBNMLC's efforts to attribute the calculations in NRBNMLC PFFCL ¶ 149 to Mr. Orszag are a misrepresentation. At trial, counsel for NRBNMLC walked Mr. Orszag through a series of assumptions and calculations of her devising, and asked Mr. Orszag to replicate her math. That is far from an endorsement of her methodology. 8/13/20 Tr. 2048:6-11 (Orszag) (Q: "[W]ill you accept those numbers are correct for purposes of this discussion? . . . A. . . . I have no basis one way or the other to know, so I can't give you an answer."); *id*. 2048:25-2049:2 ("[Y]ou are asking me to make an assumption. If you are telling me to assume that, sure.").

To the extent that NRBNMLC's counsel's calculations might provide a useful basis for comparing the very different rate structures under the CPB/NPR settlement and the current statutory royalty rate structure, they show that the vast majority of noncommercial webcasters

would be worse off if they paid the CPB/NPR average per-ATH price. NRBNMLC's counsel calculates that the average per-ATH price under the CPB/NPR settlement provides a discount of about 90% off of commercial rates. However, 97% of noncommercial webcasters pay only the minimum fee under the current statutory royalty rate structure. They receive up to about a 99% discount off of commercial rates. *See* SX PFFCL ¶¶ 1366-71.

Even larger noncommercial webcasters with usage above the 159,140 ATH threshold also receive significant discounts under the current statutory royalty rate structure. *See id.* ¶¶ 1419-27. For example, WGTS [redacted]. In 2018, it paid [redacted] in statutory royalties, consisting of [redacted] in minimum fees and [redacted] in per-performance royalties. Ex. 5625, App. E (Ploeger WRT). If it had paid for all of its performances at the commercial rate of $0.0018 from its first performance, it would have paid about [redacted].[5] This represents more than a [redacted] discount from commercial rates. In 2018, Family Radio received about a [redacted] discount off of commercial rates, and EMF received about a [redacted] discount off of commercial rates. *See* SX PFFCL ¶¶ 1424, 1426.

NRBNMLC is thus correct that the very largest noncommercial webcasters would receive larger discounts from commercial rates if they paid the average per-ATH pricing NRBNMLC's counsel believes is implied by the CPB/NPR settlement (assuming maximum usage under the CPB/NPR settlement and that such a comparison metric is relevant). However, the CPB/NPR settlement is not a comparable benchmark for setting rates, making that comparison meaningless, including because (1) the average per-ATH pricing under the CPB/NPR settlement reflects significant benefits that SoundExchange receives under that settlement as compared to the current

[5] This estimate includes an estimated 22,916,160 performances included with the minimum fee (calculated as 159,140 ATH × 12 month × 12 performances per ATH) plus [redacted] performances for which WGTS paid per-performance royalties (calculated as [redacted] ÷ $0.0018), for a total of [redacted] performances payable at $0.0018 per-performance. *See* Ex. 5625 ¶ 40 (Ploeger WRT).

statutory rate structure for other noncommercial webcasters, and (2) [redacted], and one would not necessarily expect discounts to be extended proportionally to larger users. *See id.* ¶¶ 1500, 1522; *supra* Resp. to ¶¶ 120-21, 137-38; *infra* Resp. to ¶ 152.

Response to ¶ 150. SoundExchange incorporates its response to ¶ 149 *supra*.

VI. NRBNMLC'S RATE PROPOSAL SHOULD BE REJECTED

A. NRBNMLC's Proposed CPB/NPR Benchmark Does Not Support Either of its Two Alternative Proposed Rate Structures

Response to ¶ 151. NRBNMLC's rate proposal is based on an effort to resuscitate a non-comparable benchmark that it has proffered twice before and had rejected by the Judges both times. *See Web IV*, 84 Fed. Reg. at 26394; *Web II*, 72 Fed. Reg. at 24098-99. The Judges must again reject that proposed benchmark because the CPB/NPR settlement remains radically different from the hypothetical target market for which the Judges are to set rates and from the rate structures proposed by NRBNMLC, and NRBNMLC makes no meaningful effort to confront the differences. *See* SX PFFCL ¶¶ 1482-1505, 1512-29; *supra* Resp. to ¶¶ 120-21, 137-38.

Response to ¶ 152. What NRBNMLC refers to as "Alternative 1" in its Proposed Rates and Terms, and calls "Option 1" in NRBNMLC PFFCL ¶ 152, is not really proposed as an alternative or an option. A drafting note to its Alternative 2 explains that "NRBNMLC proposes that the rates and terms proposed in Alternative 1 apply but with Subpart E below added to the regulations." NRBNMLC Amended Proposed Rates and Terms, App. A at 10 (italics omitted). The idea seems to be that if the Judges were to adopt Alternative 2 for selected religious broadcasters, they would also adopt Alternative 1 for everyone else. *See* SX PFFCL ¶¶ 1528-29. Clearer nomenclature might refer to Alterative 1 as NRBNMLC's primary rate proposal and Alternative 2 as a potential add-on. Nonetheless, SoundExchange uses NRBNMLC's naming.

NRBNMLC's Alternative 1 is similar to the current statutory royalty rate structure, except that it annualizes the 159,140 ATH threshold—an economically significant change that has no basis in even NRBNMLC's benchmark—and plucks from NRBNMLC's perception of the CPB/NPR settlement its preferred one-third of commercial rate pricing for usage over the 159,140 ATH per month threshold. *See id*. ¶¶ 1469, 1482-1505, 1512-14; *see also Web IV*, 84 Fed. Reg. at 26394 ("To pluck out a single element of the deal . . . and cite it as support for the NRBNMLC rate proposal simply lacks credibility."). Alternative 1 is not supported by the proposed CPB/NPR settlement benchmark, because the CPB/NPR settlement is not a comparable benchmark, and NRBNMLC has done nothing to account for the radically different rate structures. *Supra* Resp. to ¶¶ 120-21, 137-38.

The Judges do not have the authority to adopt NRBNMLC's proposed Alternative 2 rate structure. *See* SX PFFCL ¶¶ 1518-20. Even if the Judges did have authority to adopt that proposal, Alternative 2 is only superficially similar to the CBP/NPR settlement rate structure. NRBNMLC makes two critical changes—extending it proportionally to 50% more usage and carving out an exception to the consolidated reporting that is a "major benefit that was coming out of the negotiation for SoundExchange." 8/17/20 Tr. 2232:18-25, 2233:1-15 (Tucker).

The first change is based solely on multiplication, not any economic analysis of whether a proportional adjustment is appropriate. *See* Ex. 3060 ¶¶ 34-37 (Steinberg AWDT). Yet one would not necessarily expect a licensee to receive the kind of proportional discount proposed by Professor Steinberg. For example, Microsoft's discounts for nonprofit organizations vary with the size of the organization, with larger discounts for smaller organizations. Ex. 5605 ¶¶ 127-28, 142 & n.302 (Tucker CWRT). Similarly, Ms. Burkhiser gives the example of a piano manufacturer donating a piano to Family Radio. Ex. 3062 ¶ 61 (Burkhiser WDT). One would not expect to generalize from

that example that the manufacturer would be willing to donate a piano a week for resale by Family Radio.

The change to reporting would deny SoundExchange the benefit of its bargain with CPB/NPR without providing any assurance whatsoever that NRBNMLC would be willing or able to step up to a similar reporting role as NPR has under the CPB/NPR settlement. *See* SX PFFCL ¶¶ 1523-27. Yet despite the superficial similarity of the rate structure, the CPB/NPR settlement is still not a comparable benchmark, because of many differences between the public radio benchmark market and the hypothetical target market for which the Judges are to set rates. *See* SX PFFCL ¶¶ 1515-29; *supra* Resp. to ¶¶ 120-21, 137.

Response to ¶ 153. SoundExchange incorporates its responses to ¶¶ 122-25, 131-35, 152 *supra*.

B. NRBNMLC's Proposed CPB/NPR Benchmark Does Not Support Its Proposed Alternative 1

Response to ¶ 154. NRBNMLC's proposed Alternative 1 bears no resemblance whatsoever to the royalty rate structure under the CPB/NPR settlement. NRBNMLC's Alternative 1 is similar to the current statutory royalty rate structure, except that it annualizes the 159,140 ATH threshold and changes the relationship between the rate noncommercial webcasters pay for usage over the 159,140 ATH threshold and the commercial rate. NRBNMLC Amended Proposed Rates and Terms, App. B at 9. By contrast, SoundExchange's *Web V* settlement with CPB/NPR requires up-front payments of large annual lump-sum royalties and requires NPR to provide consolidated reporting for hundreds of public radio stations. Ex. 3020 at 7, 9. These features provide significant benefits to SoundExchange that NRBNMLC simply ignores, even as it helps itself to additional benefits from annualizing the ATH threshold. *Supra* Resp. to ¶ 152. The unique features of the CPB/NPR rate structure are among the reasons the Judges have previously rejected NRBNMLC's

efforts to rely on it as a benchmark offered in support of a radically different rate structure. *See Web IV*, 84 Fed. Reg. at 26394; *Web II*, 72 Fed. Reg. at 24098-99. Further, beyond the rate structure, the CBP/NPR settlement is not a comparable benchmark, because of the many differences between the public radio benchmark market and the hypothetical target market for which the Judges are to set rates. *See* SX PFFCL ¶¶ 1482-1505; *supra* Resp. to ¶¶ 120-21, 137-38.

Response to ¶ 155. NRBNMLC's plucking out the one-third of commercial rates ratio it perceives in the CPB/NPR settlement and inserting it into something like the current rate structure as its proposed Alternative 1 is unreasonable. *See Web IV*, 84 Fed. Reg. at 26394 ("To pluck out a single element of the deal . . . and cite it as support for the NRBNMLC rate proposal simply lacks credibility.").

First, the one-third of commercial rates ratio is not even a term of the CPB/NPR settlement. It is part of an analysis SoundExchange conducted [[redacted]]. *See* Ex. 3022; SX PFFCL ¶¶ 1507-08. Professor Steinberg's linkage of that analysis to the CPB/NPR settlement for the *Web IV* period shows only that when SoundExchange entered into the *Web IV* CPB/NPR settlement, [[redacted]]. *See* Ex. 3022 (Tab [[redacted]]); *supra* Resp. to ¶¶ 140-46.

Second, the actual settlement provides significant benefits to SoundExchange that NRBNMLC simply ignores while latching on to the one-third of commercial rates ratio it perceives as underlying the agreement. *See supra* Resp. to ¶¶ 137-38, 147, 152, 154. For example, Professor

Steinberg conceded that consolidated reporting provides cost savings for SoundExchange, and that those savings are not reflected in NRBNMLC's proposed Alternative 1. 8/26/20 Tr. 4068:7-13, 4068:23-4069:4 (Steinberg); *see also* 9/9/20 Tr. 5803:22-23 (Ploeger). If the comparability of the CPB/NPR settlement to the target could be established (and it has not been), it would be necessary to account for all of the benefits SoundExchange receives under the CPB/NPR settlement.

Third, the rates that NRBNMLC cites are the rates from [ ]. That is not merely a coincidence. The document from which NRBNMLC sourced them, Exhibit 3022, is explicitly [ ]. The Judges are prohibited from taking those rates into account. 17 U.S.C. § 114(f)(4)(C); *supra* Resp. to ¶ 140.

Finally, the one-third ratio in RIAA's *Web I* rate proposal was part of a very different rate structure under which performances were payable at the one-third ratio from the first performance, not after 159,140 ATH per month of even more heavily discounted usage. That rate structure would be less favorable than the current rate structure for the vast majority of noncommercial webcasters. *Supra* Resp. to ¶ 123.

Response to ¶ 156. The Judges should reject NAB's proposal to set a separate rate for simulcasts because there is no basis for distinguishing simulcasting from other commercial webcasting, *see* SX PFFCL ¶¶ 1062-1147, and the economic analysis underlying NAB's rate proposed is deeply flawed. *See id.* ¶¶ 1148-1291. Thus, NAB's effort at benchmarking provides no basis for an adjustment to NRBNMLC's proposed but non-comparable CPB/NPR benchmark. To the extent that the Judges might consider such an adjustment, there is no basis for Professor

Steinberg's assertions about the relative willingness to pay of CPB/NPR and large noncommercial webcasters. *See supra* Resp. to ¶¶ 131-35.

Response to ¶ 157. NRBNMLC's calculations of the number of channels or stations offered by the 20 noncommercial webcasters with usage in excess of the 159,140 ATH threshold is off by two channels or stations. The correct number is [ ] channels or stations.[6] Ex. 5625, App. E (Ploeger WRT).

More fundamentally, comparing the average per-ATH price under the CPB/NPR settlement with the royalties paid by large noncommercial webcasters under the current statutory royalty rate structure is inappropriate. The proposed CPB/NPR settlement benchmark is not comparable to the hypothetical market for which the Judges are to set rates. *Supra* Resp. to ¶¶ 121, 137-38. The CPB/NPR settlement and the current statutory rate regulations for noncommercial webcasters also have very different rate structures, and NRBNMLC simply ignores the benefits to SoundExchange under the CPB/NPR settlement, even as it helps itself to additional benefits from annualizing the ATH threshold in its Alternative 1. *Supra* Resp. to ¶ 154. Thus, NRBNMLC is comparing the pricing of two very different things, which is a pointless exercise.

However, to the extent the Judges might be interested in comparing average per-ATH fees under the CPB/NPR settlement (assuming maximum usage) and the current statutory royalty rate structure, such a comparison shows that the vast majority of noncommercial webcasters would pay more than they do under the current rate structure if they paid the CPB/NPR average per-ATH price. *Supra* Resp. to ¶ 149. It is only by comparing pricing for just the largest noncommercial webcasters that NRBNMLC makes the per-ATH price under the CPB/NPR settlement look low. However, [ ],

[6] Calculated as [ ] in minimum fees ÷ $500.

and one would not necessarily expect discounts to be extended proportionally to larger users. *See* SX PFFCL ¶¶ 1500, 1522; *supra* Resp. to ¶¶ 149, 152.

Response to ¶ 158. While NRBNMLC pitches its proposal to annualize the well-accepted 159,140 ATH threshold significantly as a measure to save transaction costs (which it never tries to quantify or even explain), that proposal's accommodation of "seasonal listener peaks and valleys" is a material economic term, because it would allow the provider of a channel to cover with the minimum fee a big surge in seasonal usage that would currently be compensable. *See* SX PFFCL ¶¶ 1512-13. This is not a theoretical concern. [[redacted]]. Ex. 3059 (Tab "[redacted]," Line 80). The majority of that usage would be covered by the minimum fee under NRBNMLC's proposal. *See* SX PFFCL ¶ 1513.

When the Judges originally adopted the 159,140 ATH per month threshold, it was as "a proxy for assessing the convergence point between Noncommercial Webcasters and Commercial Webcasters in order to delineate a distinct noncommercial submarket in which willing buyers and willing sellers would have a meeting of the minds that would result in a lower rate than the rate applicable to the general commercial webcasting market." *Web II*, 72 Fed. Reg. at 24100. A channel or station that greatly surpasses that convergence point, but happens to do so in only a month or two out of the year, should pay commercial rates in those months. Christmas music is ubiquitous at Christmas time. Ex. 5625 ¶¶ 19-20, 41 (Ploeger WRT); 8/13/20 Tr. 1971:5-7 (Orszag). A copyright owner in a free market is unlikely to price discriminate in favor of a large noncommercial outlet for Christmas music given the risk of diversion from commercial outlets for Christmas music. *See* SX PFFCL ¶¶ 1375-80, 1514.

While NRBNMLC proposes to change the statutory royalty rate structure to confer on licensees the significant benefit of additional usage bundled into the minimum fee, it makes no effort to adjust its proposed CPB/NPR benchmark to take that benefit into account. *Supra* Resp. to ¶¶ 154, 157.

C. NRBNMLC's Proposed CPB/NPR Benchmark Does Not Support Its Proposed Alternative 2

Response to ¶ 159. The Judges do not have the authority to adopt NRBNMLC's proposed Alternative 2 rate structure. *See* SX PFFCL ¶¶ 1518-20. Even if the Judges did have authority to adopt that proposal, they should not do so. Alternative 2 is superficially similar to the CBP/NPR settlement rate structure, but NRBNMLC makes two critical changes—extending it proportionally to 50% more usage and carving out an exception to the consolidated reporting that is a "major benefit that was coming out of the negotiation for SoundExchange." 8/17/20 Tr. 2232:18-25, 2233:1-15 (Tucker).

The first change is based solely on multiplying the key deal parameters by 1.5, not any economic analysis of whether a proportional increase in the key deal parameters is appropriate. *See* Ex. 3060 ¶¶ 34-37 (Steinberg AWDT). However, one would not necessarily expect a licensee to receive the kind of proportional discount proposed by Professor Steinberg. Ex. 5605 ¶¶ 127, 142 & n.302 (Tucker CWRT); *supra* Resp. to ¶ 152.

The second change would deny SoundExchange the benefit of its bargain with CPB/NPR without providing any assurance whatsoever that NRBNMLC would be willing or able to perform a similar consolidated reporting role as NPR has under the CPB/NPR settlement. *See* SX PFFCL ¶¶ 1523-27. Yet despite the superficial similarity of the rate structure, the CBP/NPR settlement is still not a comparable benchmark, because of many differences between public radio and the

hypothetical target market for which the Judges are to set rates. *See id.* ¶¶ 1515-29; *supra* Resp. to ¶¶ 120-21, 137.

Response to ¶ 160. SoundExchange incorporates its response to ¶ 159 *supra*.

Response to ¶ 161. To be sure, SoundExchange receives important benefits from the lump-sum up-front payments provided by the CPB/NPR settlement, including the time value of money and protection from bad debt and avoiding costs of processing multiple payments. *See* SX PFFCL ¶¶ 1493, 1496, 1505; 8/26/20 Tr. 4066:24-4067:4 (Steinberg); *Web IV*, 84 Fed. Reg. at 26394; *Web II*, 72 Fed. Reg. at 24098-99. The absence of those things in NRBNMLC's proposed Alternative 1 is among the many reasons the CPB/NPR settlement does not provide support for adopting Alternative 1. *Supra* Resp. to ¶¶ 154-58.

SoundExchange also receives a significant benefit from consolidated reporting, whereby NPR "collects together the messy data of the individual stations and reports it as part of the agreement." 8/17/20 Tr. 2232:12-17 (Tucker); *see infra* Resp. to ¶ 176. NRBNMLC conditions consolidated reporting for religious webcasters on a future agreement. NRBNMLC Amended Proposed Rates and Terms, Ex. A at 14. There is no assurance NRBNMLC and SoundExchange would ever reach agreement on consolidated reporting if the Judges were to adopt Alternative 2 and, even if they did, there is no assurance NRBNMLC would satisfactorily perform the work necessary to deliver meaningful benefits to SoundExchange. 9/9/20 Tr. 5884:15-5885:5, 5886:18-5887:7 (Ploeger).

Response to ¶ 162. If Alternative 2 were adopted, it would be necessary to adopt some other set of rates and terms to provide complete coverage of noncommercial webcasters. *See* SX PFFCL ¶¶ 1528-29. That likely would increase SoundExchange's costs, because it would be required to implement a different rate structure and processing. 9/9/20 Tr. 5804:2-6 (Ploeger).

However, the Judges should not adopt either Alternative 1 or Alternative 2. *See* SX PFFCL ¶¶ 1467-1529; *supra* Resp. to ¶¶ 151-61.

Response to ¶ 163. Neither Alternative 1 nor Alternative 2 comports with the willing buyer/willing seller rate standard, because the sole justification NRBNMLC provides for them is a non-comparable benchmark that does not support either proposed rate structure. *See* SX PFFCL ¶¶ 1467-1529; *supra* Resp. to ¶¶ 151-61.

VII. SOUNDEXCHANGE WITNESSES HIGHLIGHTED SOME OF THE ISSUES WITH RELYING ON THE PROPOSED CPB/NPR BENCHMARK

Response to ¶ 164. There are many reasons why the Judges must reject NRBNMLC's proposed CPB/NPR benchmark in this proceeding, just as they rejected it in past proceedings. *See Web IV*, 84 Fed. Reg. at 26394; *Web II*, 72 Fed. Reg. at 24098-99; *see also* SX PFFCL ¶¶ 1482-1505, 1512-29; *supra* Resp. to ¶¶ 120-21, 137-38, 151-63.

A. Differences in Music Intensity Contribute to the Non-Comparability of the Proposed CPB/NPR Benchmark

Response to ¶ 165. In *Web IV*, the Judges rejected reliance on a CPB/NPR settlement benchmark proposed by NRBNMLC. They cited numerous reasons for finding the proposed benchmark non-comparable, including that "[t]he stations [covered by the CPB/NPR settlement] include a range of formats, some of which entail very limited use of recorded music." *Web IV*, 81 Fed. Reg. at 26394. Given that holding, SoundExchange is not required to *disprov*e the comparability of NRBNMLC's proposed benchmark. Rather, as the proponent of a twice-rejected benchmark being used to support a proposal for significant changes in the statutory royalty rate structure for noncommercial webcasters, NRBNMLC has the burden of coming forward with sufficient evidence to *establish* the comparability of its benchmark and its translation into the target market. *See id.* at 26320. It has not met that burden.

Response to ¶ 166. As an initial matter, large noncommercial religious broadcasters are major users of music. For example, EMF's K-LOVE network webcasts contemporary Christian music, [ ]. Ex. 5625 ¶ 22 & App. D (Ploeger WRT); Ex. 5625, App. A ¶ 33 (Bender WDT). SoundExchange provided Mediabase playlist data for [ ]. Ex. 5625, App. C (Ploeger WRT). In the third quarter of 2019, it had [ ] sound recording plays. Ex. 3040 ([ ]). That equates to [ ] plays per hour (calculated as [ ] plays ÷ 92 days ÷ 24 hours). That is somewhat higher than even the average of [ ] plays per hour that Mr. Ploeger calculated for the ten noncommercial Christian adult contemporary stations for which SoundExchange provided Mediabase data. Ex. 5625 ¶ 40 n.31 (Ploeger WRT); NRBNMLC PFFCL ¶ 145.

By contrast, data concerning [ ] entities covered by the CPB/NPR settlement shows exactly the kind of variation in music use observed by the Judges in *Web IV*. Many stations are identified as being at least in part news stations, and some are identified as news and information stations. Ex. 3035 (Column T). Obviously there are NPR stations that play music; some of them probably play a lot of music. But many or perhaps even most NPR stations covered by the CPB/NPR settlement have formats that are less music intensive than the contemporary Christian music stations that account for the vast majority of noncommercial webcasting royalties.

Response to ¶ 167. This difference in music intensity is relevant because in the hypothetical target market, the buyer is not hundreds of stations but one station. *Web II*, 72 Fed. Reg. at 24091 ("[T]he willing buyers are the services which may operate under the webcasting license (DMCA-compliant services)."). Regardless of whether the usage cap in the CPB/NPR settlement is denominated in music ATH or plain ATH, a free-market bargain between one record

company and one radio station is likely to be influenced by "how integral music is in their programming." 8/17/20 Tr. 2230:12-24 (Tucker).

It is not quite accurate that the CPB/NPR settlements "only charge for Music ATH." NRBNMLC PFFCL ¶ 167. The CPB/NPR settlement actually charges a lump sum for the right to transmit up to a certain number of music ATH. Ex. 3020 at 7. How much of the available Music ATH the public radio stations use is up to them. For example, during the *Web III* period addressed by Exhibit 3022, [redacted]. *See* Ex. 3022 (Tab "[redacted]," Line 16); SX PFFCL ¶ 1510. Perhaps it might be possible to reconcile these complications in a careful effort to translate the proposed CPB/NPR benchmark into the target market, but NRBNMLC did not make any effort to do so. *See* SX PFFCL ¶ 1511.

Response to ¶ 168. NRBNMLC mixes apples and oranges when it refers to the [redacted] conversion factor used in Exhibits 3022 and 3041. As NRBNMLC notes elsewhere, the usage cap under the CPB/NPR settlement is denominated in music ATH, not plain ATH. NRBNMLC PFFCL ¶¶ 167, 170; Ex. 3020 at 7-8. Exhibits 3022 and 3041 clearly apply the [redacted] conversion factor to a number of music ATH, rather than a number of plain ATH, since they multiply it by a number derived from reporting by NPR stations under the CPB/NPR settlement. *See* Ex. 3022 (Tab "[redacted]," Line 20); Ex. 3041 (Tab "[redacted]," Line 15).

However, recordings per ATH and recordings per music ATH are very different metrics, because the calculation of music ATH omits non-music programming. *Compare* 37 C.F.R. § 380.7 (definition of ATH) *with* Ex. 3020 at 6. Recordings per ATH is an indicator of the intensity of music use by a service, because it includes non-music programming in the denominator of the calculation. By contrast, recordings per music ATH is an indicator of the length of the musical recordings used by a service, because it includes only music programming in the denominator. A

simple and extreme example illustrates the point. Suppose a webcaster has one listener and transmits one three-minute recording per hour. Over the course of 20 hours, it will accrue 20 plain ATH but only one music ATH (calculated as 20 recordings × 3 minutes = 60 minutes). Its 20 recordings per 20 ATH indicate a low intensity of music use. Its 20 recordings per one music ATH indicate only the three-minute song length. A webcaster that transmitted 20 three-minute recordings back-to-back would have the same 20 recordings per one music ATH.

Because the [[redacted]] conversion factor applied to music ATH is irrelevant to the intensity of music use, it is irrelevant to NRBNMLC's argument that the Judges erred when they relied on differences in intensity of music use to reject NRBNMLC's proposed CPB/NPR benchmark. *See supra* Resp. to ¶ 165.

Response to ¶ 169. Every station has its own mix of programming, but the vast majority of noncommercial webcaster royalties are paid by contemporary Christian music stations. *Supra* Resp. to ¶ 166; *infra* Resp. to 172. Family Radio may play less music than K-LOVE, but it still uses a lot of music. *Supra* Resp. to ¶ 8. NRBNMLC has provided no basis for systematic comparison of relative music use by NPR stations and religious broadcasters with music formats. *See supra* Resp. to ¶ 166. That is a reason it has not established the comparability of its proposed benchmark. *See supra* Resp. to ¶¶ 120-21, 137-38.

Response to ¶ 170. SoundExchange incorporates its response to ¶ 167 *supra*.

B. Differences in Musical Variety Contribute to the Non-Comparability of the Proposed CPB/NPR Benchmark

Response to ¶ 171. When the Judges rejected reliance on NRBNMLC's CPB/NPR settlement benchmark in *Web IV*, they referred to the "range of formats" of NPR stations, suggesting that they viewed differences in musical variety as relevant. *Web IV*, 81 Fed. Reg. at 26394. In any event, NRBNMLC has the burden of coming forward with sufficient evidence to

establish the comparability of its benchmark and its translation into the target market, and it has failed to do so. *See supra* Resp. to ¶ 120-21, 137, 165.

Response to ¶ 172. NRBNMLC's focus on the current statutory royalty rate structure (even as it proposes significant changes to that rate structure) ignores the process that would be followed in a proper benchmarking analysis. That process involves identifying a comparable benchmark, adjusting it as necessary to properly reflect the target market, and then translating it into a statutory royalty rate. *See supra* Resp. to ¶¶ 111, 121; *see generally* SX PFFCL ¶¶ 74-128. NRBNMLC commits a logical error by reasoning backwards and concluding that because there are no genre differences in the statutory rate structure, it is not necessary to consider whether genre differences might be relevant to comparability or potential adjustments to a benchmark.

There clearly are differences in musical variety between NPR stations and other noncommercial webcasting. In addition to representing a range of specific genres, a majority of NPR stations relying on the CPB/NPR settlement offer a channel in a "Music Mix" format, and many stations throw news into that mix as well. Ex. 3035 (Column T) ([ ]). By contrast, contemporary Christian music stations pay the overwhelming majority of noncommercial webcasting royalties. SX PFFCL ¶ 1397. [ ]. *Id.* ¶ 1386. In 2018, [ ]. Ex. 5605 ¶ 120 (Tucker CWRT). Radio Training Network was the [ ] noncommercial webcaster in 2018. Ex. 5625, App. E (Ploeger WRT). Its JOY FM station plays contemporary Christian music. *Id*. ¶ 18. Even Family Radio plays a lot of contemporary Christian music. *See* SX PFFCL ¶ 1395.

The concentration of contemporary Christian music programming as compared to the more diffuse music mix programming of many NPR stations has potential implications for bargaining in the target market. The target market is one in which the buyer is one station, and the product the buyer is buying is a blanket license of one copyright owner's catalog. *Web II*, 72 Fed. Reg. at 24091. Viewed through that lens, the concentration of noncommercial webcaster royalty payments in use of music by "popular Christian artists" as compared to the more "diffuse" use of music by NPR stations at least seems like a factor to investigate rather than ignore. *See* 8/17/20 Tr. 2230:25-2231:16 (Tucker).

There are artists who dedicate their careers to performing Christian music, and record labels that devote their business to producing and distributing Christian music. Ex. 5625 ¶ 28 (Ploeger WRT). When a noncommercial religious webcaster approaches such a label for a license, the Christian music available from that label is "definitely integral" to the webcaster. 8/17/20 Tr. 2226:17-2227:10, 2230:12-2231:16 (Tucker). And the label may be particularly reluctant to extend a large discount to a large noncommercial webcaster that is a major outlet for its music, given both the direct impact on its revenue and the potential for diversion from the other outlets for its music. *See* SX PFFCL ¶¶ 1417, 1501-02. It at least seems plausible that the bargaining dynamics might be different when a music mix station seeks more diverse repertoire. Yet Professor Steinberg did not even consider this possibility. *See id.* ¶ 1503.

Response to ¶ 173. While there may be some Christian radio stations that focus on eclectic genres of Christian music, they presumably would face bargaining dynamics more like other specialized Christian radio stations than music mix radio stations. *Supra* Resp. to ¶ 172. There is also no reason to believe that these stations would be material to an economic analysis comparing religious broadcasters to NPR stations. A Family Radio document states that [redacted]

[redacted] Ex. 5271 at 9, 14; *see also* Ex. 5625 ¶ 22 (Ploeger WRT) (EMF is "engaged in aggressive growth mode"). There is no evidence of any urban gospel station or children's Christian station paying more than the minimum fee. *See supra* Resp. to ¶ 172.

Response to ¶ 174. There is variety in the formats of non-religious noncommercial webcasters, but they do not pay very much in statutory royalties, making them much less significant to an economic analysis than Christian music stations. The large station described in NRBNMLC PFFCL ¶ 174, [redacted], was the [redacted]. Ex. 5625, App. E (Ploeger WRT); *see also id.* ¶ 46 n.39. That constitutes just [redacted] of the $2,587,399.77 in total noncommercial webcaster statutory royalty payments in 2018. *Id.* ¶ 37 n.26. The various stations described in ¶ 44 of Mr. Ploeger's written rebuttal testimony [redacted]. *Id.* ¶ 44, App. E.

Response to ¶ 175. When NRBNMLC refers to NPR stations focusing "quite heavily" on certain genres of music, it means that [redacted]. Exhibit 3035 lists [redacted] public radio entities covered by the CPB/NPR settlement in the second quarter of 2019. Ex. 3035. Up to 530 stations may be covered by the CPB/NPR settlement. 80 Fed. Reg. at 59590. The [redacted] channels accounted for by NRBNMLC represent no more than [redacted] of the total entities and about [redacted] of the maximum covered stations. About [redacted] of these entities provided a music mix station covered by the settlement. Ex. 3035 (Column T).

C. Differences in Reporting Requirements Contribute to the Non-Comparability of the Proposed CPB/NPR Benchmark

Response to ¶ 176. When the Judges rejected reliance on NRBNMLC's CPB/NPR settlement benchmark in *Web IV*, they specifically highlighted that "NPR consolidates the reports of use for all of the stations covered by the agreement" while "NRBNMLC's proposal does not

provide for consolidated reports of use." *Web IV*, 81 Fed. Reg. at 26394. They also included in a list of the "significant benefits" provided to SoundExchange by the CPB/NPR settlement but not by the NRBNMLC proposal the "reduced costs of processing usage data." *Id*. Once again, NRBNMLC has failed to come forward with sufficient evidence to establish that the Judges were wrong in *Web IV*. *See supra* Resp. to ¶ 165.

The Judges were clearly correct in *Web IV* that SoundExchange receives "significant benefits" from consolidated reporting under the CPB/NPR settlement. SoundExchange incurs substantial costs to handle the reporting provided by webcasters. Ex. 5625 ¶ 14 (Ploeger WRT); Ex. 5603 ¶ 173 (Orszag WRT). This is because every report of use it receives must go through a painstaking process that includes receiving and validating the report, matching it to a payment and statement of account, following up on issues, and matching the reported usage to repertoire. Ex. 5625, App. A ¶¶ 10-11, 13-14 (Bender WDT). If SoundExchange does not receive a report of use from a webcaster, it must expend efforts to obtain it. *Id.*, App. A ¶ 12. And if a report of use contains poor quality data, SoundExchange must either rectify that or manually match the reported usage. *Id.*, App. A ¶ 15; *see also Web IV*, 81 Fed. Reg. at 26396 ("[C]osts to SoundExchange vary depending on such factors as the quality of the data a service submits"). As the Judges have observed, that is "substantial work." *Web II*, 72 Fed. Reg. at 24096 & n. 37; *see also* 9/9/20 Tr. 5791:3-19 (Ploeger) ("effort-intensive").

Under the CPB/NPR agreement, NPR "collects together the messy data of the individual stations and reports it as part of the agreement." 8/17/20 Tr. 2232:12-17 (Tucker). Thus, SoundExchange does not need to chase after and process hundreds of reports of use, but only "a single consolidated log provided to us by NPR Digital Services." 9/9/20 Tr. 5803:12-17 (Ploeger). "There is a benefit to receiving fewer logs because there [are] just fewer items to deal with." 9/9/20

Tr. 5884:11-13 (Ploeger). Before SoundExchange gets that data, NPR does "quality assurance to try and clean up as best they can so that it can come to us in a way that it can be more efficient for us to process." 9/9/20 Tr. 5822:21-24 (Ploeger); *see also id*. at 5803:14-19. This quality assurance process has evolved over many years of working together to try to improve the quality of reporting by public radio stations. 9/9/20 Tr. 5886:18-5887:7 (Ploeger). Lightening SoundExchange's burden of processing reports of use from hundreds of individual stations is clearly a "major benefit that was coming out of the negotiation for SoundExchange." 8/17/20 Tr. 2232:18-25, 2233:1-15 (Tucker). In fact, even Professor Steinberg conceded that this consolidated reporting provides cost savings for SoundExchange. 8/26/20 Tr. 4068:7-13, 4068:23-4069:4 (Steinberg).

NRBNMLC seems to believe that the economic effects of the consolidated reporting can be ignored simply because a prefatory acknowledgement in the settlement does not specifically mention the consolidated reporting. Ex. 3020 at 8. However, the reporting is nonetheless required by the agreement. *Id.* at 9. The provision to which NRBNMLC points does not require any performance. As such it is akin to a recital in a contract. Such provisions "may provide background information or serve as an interpretative aid" but they do "not control over the operative terms of a contract." *Electra Realty Co. v. Kaplan Higher Educ. Corp*., No. 19-3070, 2020 WL 5089438, *2 (3d Cir. Aug. 28, 2020); *see also, e.g., ACIM NY, L.L.C. v. Nissan N. Am. Inc*., No. 17 Civ. 729 (LGS), 2019 WL 935424, *4 (S.D.N.Y. Feb. 26, 2019). The Judges cannot ignore an economically-significant requirement of the CPB/NPR settlement just because it is omitted from a provision akin to a recital.

Response to ¶ 177. While Mr. Ploeger was not able to quantify the value of the consolidated reporting that SoundExchange receives under the CPB/NPR settlement, it is not his job to adjust NRBNMLC's proposed benchmark. As the proponent of a proposed benchmark that

the Judges have twice rejected as non-comparable, it is NRBNMLC's responsibility to come forward with evidence addressing the comparability issues that the Judges have previously identified. *Supra* Resp. to ¶ 176.

Further, NRBNMLC mischaracterizes Mr. Ploeger's testimony. In the cited passage, which comes in the middle of a colloquy concerning submission of the CPB/NPR settlement to the Judges, Mr. Ploeger may have thought he was being asked about submission of the reporting terms to the Judges. *See* 9/9/20 Tr. 5824:6-5825:1 (Ploeger). Other portions of his testimony leave no doubt that he knows that reporting arrangements between SoundExchange and CPB/NPR have been in place since before he joined SoundExchange in 2006. 9/9/20 Tr. 5822:11-24, 5882:12-23, 5883:13-5884:4 (Ploeger).

When Mr. Ploeger was talking about possible errors in data, it is clear from the context that he was talking about a scenario where *NRBNMLC* started trying to do consolidated reporting without the benefit of the twenty years of experience that CPB/NPR have under their belt. 9/9/20 Tr. 5884:15-5885:9 (Ploeger) ("[I]f we were to do that . . . with the non-commercial webcasters, with this proposed arrangement they've made, there is no history of that on their side. So I'm—I'm unclear as to how quickly there would be material benefits from that. . . . [T]here could be data issues."). He contrasted that with SoundExchange's experience working with CPB, where "they know what they're doing." 9/9/20 Tr. 5884:21 (Ploeger).

Response to ¶ 178. NRBNMLC misrepresents its own rate proposal when it says that it includes consolidated reporting. Immediately after the passage from that rate proposal quoted by NRBNMLC is a new sentence that does not have a counterpart in the CPB/NPR settlement: "In the absence of such an agreement, Noncommercial Religious Radio Stations shall submit reports of use in accordance with then-applicable regulations in 37 C.F.R. Part 370." NRBNMLC

Amended Proposed Rates and Terms, App. B at 15. If NRBNMLC's proposed Alternative 2 were adopted, this new sentence would allow NRBNMLC to withhold its agreement to any proposed reporting arrangement at its discretion, and stick SoundExchange with the current individual station reporting regime. *See* SX PFFCL ¶ 1527. Even taking NRBNMLC at its word about its willingness "to confer with SoundExchange in good faith regarding reporting terms," it is not apparent that reporting by NRBNMLC would have the same value as reporting by CPB/NPR. *Supra* Resp. to ¶ 177.

Response to ¶ 179. Reporting by noncommercial webcasters is not at all consolidated. In 2018 there were 903 noncommercial webcasters relying on the statutory license. Ex. 5625, App. A ¶ 33 (Bender WDT). That means at least 903 separate entities individually sending periodic reporting to SoundExchange, with each of their annual and monthly or quarterly submissions needing to be processed separately through SoundExchange's entire workflow. *Supra* Resp. to ¶ 176. In fact, some of the largest services with multiple stations actually provide separate reporting for their separate stations, so the number of individual items SoundExchange has to process is actually higher than 903 per reporting period. 9/9/20 Tr. 5828:14-21 (Ploeger). Thus, at trial, when counsel for NRBNMLC asked Mr. Ploeger about the relevance of the fact that a handful of noncommercial webcasters pay most of the royalties, he vigorously denied any connection between that fact and consolidated reporting. 9/9/20 Tr. 5828:13 (Ploeger) ("They're not all consolidated.").

Response to ¶ 180. While SoundExchange has made various information technology improvements to increase the efficiency of its operations, processing of reporting by licensees remains a labor-intensive process. *Supra* Resp. to ¶ 176; SX PFFCL ¶ 1551.

Response to ¶ 181. NRBNMLC's suggestion that SoundExchange could save costs by waiving reporting requirements is irrelevant. NRBNMLC's proposed terms do not include a waiver of reporting requirements. It is NRBNMLC's responsibility to come forward with evidence supporting the proposal it made, not SoundExchange's responsibility to waive requirements set by the Judges to accommodate NRBNMLC's proposals. *Supra* Resp. to ¶ 176

D. NRBNMLC's Failure to Take into Account Actual Usage Makes Reliance on the Proposed CPB/NPR Benchmark Unreliable

Response to ¶ 182. Professor Steinberg made no effort to take into account actual ATH usage under the CPB/NPR settlement, and while he knew that station usage was generally somewhat below the cap, he did not make any adjustment for that. 8/26/20 Tr. 4069:9-4071:4.

The record shows that [ ]. Exhibit 3022 shows that [ ] while the CPB/NPR agreement covered between about 280 million and 285 million music ATH depending on the year. Ex. 3022 (Tab "[ ]," Line 16); 74 Fed. Reg. at 40622. More recent data from the *Web IV* period shows that [ ]. Ex. 3041 (Tab "[ ]," Lines 13, 34); 80 Fed. Reg. 59591. NRBNMLC is wrong when it suggests that usage over the cap would reduce the effective rate under the CPB/NPR settlement. Any such usage is simply not covered by the settlement. 80 Fed. Reg. 59591 (license fee is for usage "up to" the cap). Usage above the cap would need other license authority or risk infringement liability. 17 U.S.C. § 114(f)(3)(B). The parties' experience with this structure, including any additional payments for usage over the cap, and the parties' expectations about future usage based on their past experience, would all seem relevant to a proper analysis of

comparability and a careful effort to translate the lump sum payment structure into the per-performance structure of NRBNMLC's Alternative 1, but Professor Steinberg takes none of this into account. *See* SX PFFCL ¶ 1511.

Response to ¶ 183. The experience of stations operating under the current statutory royalty rate structure is not clearly relevant, and to the extent it might be relevant, Professor Steinberg did not take it into account. As the proponent of its CPB/NPR settlement benchmark, NRBNMLC needs to establish that its benchmark is comparable to the hypothetical target market, adjust it as necessary, and then translate it into a statutory royalty rate. *Supra* Resp. to ¶ 172; *see also supra* Resp. to ¶¶ 120-21, 137. An analysis of relative "breakage" (*i.e.*, unused ATH capacity) under the CPB/NPR settlement and the current statutory royalty rate structure might have been a useful part of such a benchmarking analysis, but Professor Steinberg did not do that.

Response to ¶ 184. NRBNMLC is correct that questions put to Professor Steinberg on cross-examination did not accurately reflect the distinction between entities and stations covered by the CPB/NPR settlement. However, the underlying point remains relevant. NRBNMLC bases its advocacy of the one-third of commercial rates ratio entirely on Exhibit 3022 and its perception that the *Web IV* and *Web V* CPB/NPR settlements embody [[redacted]] made in Exhibit 3022. *See* NRBNMLC PFFCL ¶¶ 140-48. Yet Exhibit 3022 [[redacted]]. Ex. 3022 (Tab "[[redacted]]," Line 26). While the actual number of stations relying on the *Web III* CPB/NPR settlement was somewhat higher than listed in line 13 of the "[[redacted]]" tab of Exhibit 3022, it appears that [[redacted]]. Ex. 3022 (Tab "[[redacted]]," Line 30; Tab "[[redacted]]," Column F). Reliance on

Exhibit 3022 thus [[redacted]].

E. The Use of Federal Funding for the CPB/NPR Settlement Contributes to the Non-Comparability of the Proposed CPB/NPR Benchmark

Response to ¶ 185. NRBNMLC misapprehends Professor Tucker's point. CPB is the buyer under the CPB/NPR settlement, and it uses federally-appropriated funds to pay the royalties. That is very different from the hypothetical target market, where an individual noncommercial webcaster would negotiate with an individual copyright owner. Professor Tucker would expect those differences to affect bargaining in the benchmark and target markets. However, NRBNMLC makes only a superficial effort at establishing comparability between the benchmark and target markets and does not take those differences into account. *See supra* Resp. to ¶¶ 120-21, 131-32.

VIII. NRBNMLC HAS NOT COME FORWARD WITH SUFFICIENT EVIDENCE TO JUSTIFY A BREAK WITH THE JUDGES' PAST DECISIONS CONCERNING NONCOMMERCIAL WEBCASTING RATES

A. The Current Rate Structure Is Not a "Seller-Side Construct"

Response to ¶ 186. The current statutory royalty rate structure for noncommercial webcasters originated in *Web II. See* SX PFFCL ¶¶ 1394-54. There, the Judges rejected SoundExchange's proposal to charge all noncommercial webcasters the same rates as commercial webcasters. *Web II*, 72 Fed. Reg. at 24097. Far from being a "Seller-Side Construct," *the Judges* created the familiar structure of 159,140 ATH per month of usage covered by the minimum fee, with only royalties for the usage in excess of that threshold payable at the commercial rates. This structure was based on their finding that "certain 'noncommercial' webcasters *may* constitute a distinct segment of the noninteractive webcasting market that in a willing buyer/willing seller hypothetical marketplace would produce different, lower rates than we have determined hereinabove for Commercial Webcasters," but only "up to a point." *Id.* (emphasis added). Beyond

that point, however, the Judges recognized that "[m]usic programming found on noncommercial stations competes with similar music programming found on commercial stations." *Id*. at 24098. Thus, the Judges stressed that if there were to be a regime of differentiated rates for commercial and noncommercial webcasters, the "economic rationale" of the willing buyer/willing seller standard would require "safeguards to assure that, as the submarket for noncommercial webcasters that can be distinguished from commercial webcasters evolves, it does not simply converge or overlap with the submarket for commercial webcasters and their indistinguishable noncommercial counterparts." *Id.* at 24097-98.

NRBNMLC appealed that decision, making pretty much the same arguments it does here, including that "the Judges should have 'recognized noncommercial services' unwillingness to accept a commercial rate in a marketplace transaction.'" *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 574 F. 3d 748, 768 (D.C. Cir. 2009) (quoting NRBNMLC brief). The Court rejected that argument, finding that it "speaks only to the willingness of the buyer to enter the transaction and says nothing of the seller." *Id*. Instead, the Court recognized that "competition certainly would affect the actions of a willing seller." *Id*. As a result, the Court concluded that "[t]he Judges, taking both buyers and sellers into account, came to a reasonable compromise between the two positions." *Id.* at 768-69.

SoundExchange has since accepted its *Web II* loss, incorporating the structure the Judges devised into settlements with CBI and its rate proposals in subsequent proceedings, including this one. *See* SX PFFCL ¶¶ 1355-64. This structure provides *all* noncommercial webcasters—even the ones with the highest usage—significant effective rate discounts as compared to commercial webcasters. *Intercollegiate Broad. Sys.*, 574 F. 3d at 764 ("a huge discount"). About 97% of them pay only the minimum fee, which provides up to about a 99% effective rate discount from

commercial rates. *See* SX PFFCL ¶¶ 1366-71. The noncommercial webcasters with usage above the ATH threshold receive substantial discounts too, with the largest of them, [ ]. *See id.* ¶¶ 1426-27. For all but the very largest noncommercial webcasters, the inclusion of a large block of deeply discounted usage with the minimum fee makes this structure more favorable than the *Web I* rate structure, where discounted per-performance rates applied from the first performance. *See supra* Resp. to ¶ 123.

Notwithstanding that, NRBNMLC never tires of relitigating *Web II*. Just as its criticisms of the fundamental economics of the Judges' *Web II* decision were rejected in *Web IV*, they must again be rejected here. *See Web IV*, 84 Fed. Reg. at 26391-95.

Response to ¶ 187. SoundExchange incorporates its response to ¶ 186 *supra*.

B. In a Free Market Negotiation, Large Noncommercial Webcasters Would Not Obtain Deeper Discounts Than They Already Get

1. Large Noncommercial Webcasters Like Family Radio Benefit from Deep Effective Rate Discounts Despite Paying Commercial Rates for Usage Over 159,140 ATH per Month

Response to ¶ 188. As in past proceedings, NRBNMLC's buyer-focused "testimony tells the Judges nothing about the sellers' side of the equation." *Web IV*, 81 Fed. Reg. at 26394; *Intercollegiate Broad. Sys.*, 574 F. 3d at 768 ("speaks only to the willingness of the buyer to enter the transaction and says nothing of the seller").

Furthermore, the current statutory royalty rate structure provides Family Radio a "huge" discount from commercial rates. 574 F. 3d at 764. The discount is due to the flat fee that noncommercial webcasters pay for usage on a given channel or station up to 159,140 ATH per month. Ex. 5603 ¶ 150 (Orszag WRT); *Web IV*, 81 Fed. Reg. at 26392 n.208 (the discount on the first 159,140 ATH of monthly usage "results in noncommercial webcasters paying a lower average

per-play rate than a commercial webcaster (that pays at the commercial rate for every performance)"). While the effective rate discount declines as a noncommercial webcaster transmits more performances, all noncommercial webcasters receive significant discounts. *See* SX PFFCL ¶ 1422. As a result of this structure, Family Radio paid only [redacted] in statutory royalties in 2018. If it had been required to pay royalties at commercial rates from the first transmission, its statutory royalty payment would have been [redacted]. It thus obtained a discount of [redacted] or [redacted]. *See id.* ¶ 1424.

Response to ¶ 189. NRBNMLC's presentation of differences between noncommercial and commercial webcasters is again solely buyer-focused and ignores the discounts that even large noncommercial webcasters receive under the current statutory royalty rate structure. *See supra* Resp. to ¶¶ 44-110, 188.

a. Family Radio Is a Poor Example for Drawing Conclusions about Other Large Noncommercial Webcasters, but Statutory Royalties are Not Material to Its Finances

Response to ¶ 190. The royalties Family Radio paid before 2016 were at rates under a non-precedential agreement under the Webcaster Settlement Act. 74 Fed. Reg. at 40627. The Judges must disregard NRBNMLC's comparisons between those rates and the *Web IV* rates, because they are prohibited by statute from taking "any provisions" of that Webcaster Settlement Act agreement into account in this proceeding. 17 U.S.C. § 114(f)(4)(C).

Response to ¶ 191. Family Radio has made a strategic decision to migrate away from its aging and expensive terrestrial broadcasting infrastructure and use webcasting to reach its audience instead. That has allowed it to reduce its costs of broadcasting and free up money that was previously tied up in its broadcast infrastructure. *See* SX PFFCL ¶ 1430. The impetus to pursue that strategy came from unique circumstances unrelated to streaming rates, including its failed doomsday predictions and programming antagonistic to the organized church. *See id.* ¶¶ 1441-45.

These unique circumstances make Family Radio a poor example for drawing any conclusions about noncommercial webcasters in general. Ex. 5605 ¶ 121 (Tucker CWRT).

Response to ¶ 192. Family Radio's 2015 royalty payments were made pursuant to a non-precedential agreement under the Webcaster Settlement Act. 74 Fed. Reg. at 40627. The Judges must disregard its 2015 royalty payments and NRBNMLC's comparisons thereto. 17 U.S.C. § 114(f)(4)(C).

Further, a proper analysis of the effects of online listenership on Family Radio's finances would take into account the likely substantial savings Family Radio has enjoyed on the terrestrial broadcasting side of its business by migrating away from its aging and expensive terrestrial broadcasting infrastructure. *See supra* Resp. to ¶ 191. Even without adjusting for those cost savings, statutory royalties are not material to Family Radio's finances. In 2018, statutory royalties constituted only [ ] of its revenues and [ ] of its expenses. Ex. 5605, App. 3 (Tucker CWRT). The record does not have sufficient information to analyze the claims Ms. Burkhiser made at trial about Family Radio's 2020 royalties. However, taking her at her word that its royalties have been running about $9,500 per month in 2020 ($114,000 for the year), that would constitute only 2.1% of Family Radio's *2018* revenues of $5,422,789. Ex. 5237 at 1. At trial, Mr. Wheeler testified that [ ]. SX PFFCL ¶ 1107.

b. Family Radio's Dissatisfaction with Paying Statutory Royalties Does Not Call into Question the Current Statutory Royalty Rate Structure

Response to ¶ 193. Family Radio is a poor example for drawing any conclusions about noncommercial webcasters in general. *See supra* Resp. to ¶ 191. Other noncommercial webcasters that do not have Family Radio's unique history have much greater financial resources. For example, EMF, [ ]

[redacted], *see* SX PFFCL ¶ 1431, had over $184 million in total revenue and a financial surplus of almost $55 million in 2018. Ex. 5238 at 6.

Given Family Radio's recent losses, Ex. 5237 at 1, its efforts to keep its usage closer to the 159,140 ATH per month threshold do not appear to be anything more than prudent efforts to manage costs. They are irrelevant to the rate-setting process, because free markets do not assure financial success to every entrant. *See* SX PFFCL ¶ 1102. In any event, and as the Judges explained in *Web IV*, isolated instances of noncommercial webcasters limiting usage "does not demonstrate that a substantial number of noncommercial webcasters are operating near the threshold and taking steps to keep below it." *Web IV*, 81 Fed. Reg. 26393. Further, NRBNMLC's buyer-side arguments "tell[] the Judges nothing about the sellers' side of the equation" that also must be taken into account. *Id.* at 26394; *see supra* Resp. to ¶ 186.

Response to ¶ 194. Large noncommercial religious broadcasters are entitled to have an opinion about whether the Judges erred in their past decisions concerning noncommercial webcaster statutory royalty rates, and to spend their resources relitigating those decisions if they wish to do so. However, statutory royalties are not material to the finances of the large noncommercial webcasters that pay the vast majority of noncommercial statutory royalties. SX PFFCL ¶ 1433. That would remain the case under SoundExchange's rate proposal. *Id.* ¶ 1434. Further, NRBNMLC's buyer-side arguments "tell[] the Judges nothing about the sellers' side of the equation" that also must be taken into account. *Web IV*, 81 Fed. Reg. at 26394; *see supra* Resp. to ¶ 186.

Response to ¶ 195. SoundExchange incorporates its responses to ¶¶ 193-94 *supra*.

2. Very Few Noncommercial Webcasters Have Usage Over 159,140 ATH per Month Threshold, but for Those That Do, Economic Logic Dictates That They Pay Commercial Rates on the Additional Usage

Response to ¶ 196. In *Web IV*, the Judges confronted questions concerning the reasonableness of the 159,140 ATH per month threshold, and concluded that it was "reasonable and workable" because only about 3% of noncommercial webcasters paid royalties in excess of the minimum fee in 2010-2014. *Web IV*, 84 Fed. Reg. at 26393. Five years later, the situation is essentially unchanged. In 2018, approximately 97% of noncommercial webcasters paid only the minimum fee. *See* SX PFFCL ¶ 1369. At trial, NRBNMLC's expert Dr. Steinberg confirmed that very few stations have excess usage, and just "two of them account for the vast majority of all the reporting that's necessary for excess fees." 8/26/20 Tr. 4027:4-10 (Steinberg). For the noncommercial webcasters with higher levels of usage, the Judges' task of setting a willing buyer/willing seller rate requires looking at both the buyer and seller side of the equation. *See supra* Resp. to ¶ 186. When one does that, "economic logic dictates" that noncommercial webcasters above the ATH threshold pay commercial rates for their excess usage. *Web IV*, 81 Fed. Reg. at 26395.

C. The CPB/NPR Settlement Is Not Informative of the Rate that Should be Paid by Other Noncommercial Webcasters

Response to ¶ 197. Because CPB uses federal government money to pay all the statutory royalties for noncommercial broadcasters affiliated with NPR, NPR stations pay nothing. *See supra* Resp. to ¶¶ 121, 131. Setting aside the federal subsidy, what NRBNMLC perceives as a "disparity" between the current statutory royalty rate structure and SoundExchange's settlement with CPB/NPR, and even calls discrimination against religious broadcasters, is nothing more than a reflection of the numerous differences between NPR stations and the noncommercial religious webcasters that pay the vast majority of the noncommercial royalties to be set by the Judges, and

between the CPB/NPR Settlement and the hypothetical market for which the Judges must set rates in this proceeding. SoundExchange has addressed those differences at length. Because NRBNMLC has not made a meaningful effort to establish the comparability of its proposed CPB/NPR benchmark, adjust for differences, and translate its benchmark into its proposed rate structure, the CPB/NPR settlement is not informative of the rate that should be paid by non-NPR noncommercial webcasters. *See* SX PFFCL ¶¶ 1482-1529; *supra* Resp. to ¶¶ 120-85.

Response to ¶ 198. There is certainly variation in the genres of music used by the 903 noncommercial webcasters relying on the statutory license (excluding college broadcasters and NPR stations). Ex. 5625 ¶ 44 (Ploeger WRT); Ex. 5625, App. A ¶ 33 (Bender WDT). NRBNMLC has even identified 12 channels or stations with programming that may be in the classical, jazz, and adult alternative formats. It has also identified [ ] NPR stations (out of 530 eligible for the CPB/NPR settlement) broadcasting in classical, jazz, and adult alternative formats. *See supra* Resp. to ¶ 175. However, this small amount of overlap is irrelevant.

NRBNMLC ignores that 97% of the 903 noncommercial webcasters, including all the ones it mentions except [ ], pay only the minimum fee. *See* SX PFFCL ¶ 1369; Ex. 5625 ¶ 46 & n.39 (Ploeger WRT). Both SoundExchange and NRBNMLC propose that all of those webcasters with usage below 159,140 ATH per month continue to pay only the minimum fee. *See* SX PFFCL ¶¶ 1348, 1469. Because there is no disagreement between SoundExchange and NRBNMLC concerning the treatment of these services, presumably NRBNMLC does not really believe that they are being discriminated against.

Under NRBNMLC's rate proposal, [ ] would be subject to its Alternative 1 even if the Judges were to adopt Alternative 2, because [ ] is not a religious broadcaster. *See supra* Resp. to ¶ 152. While NRBNMLC's rate proposal would have cut [ ] 2018 statutory

royalty payments by [redacted],[7] NRBNMLC has made no effort to establish that such a cut would be material to [redacted] finances or is even a particular goal of [redacted]. It would have paid much higher royalties under the *Web I* rate structure. *See supra* Resp. to ¶ 123.

NRBNMLC's new-found desire to advocate the interests of a few classical, jazz, and adult alternative stations also ignores that the vast majority of noncommercial webcaster statutory royalties are paid by a handful of large contemporary Christian music stations. As NRBNMLC's expert Professor Steinberg noted, just "two of them account for the vast majority of all the reporting that's necessary for excess fees." 8/26/20 Tr. 4027:4-10 (Steinberg). Those well-resourced organizations and their very high-usage channels are quite different from NPR stations, and SoundExchange's settlement with CPB/NPR is very different from NRBNMLC's rate proposals. *See, e.g.*, *supra* Resp. to ¶¶ 137-38.

Thus, for example, while NRBNMLC points to a little overlap in the genres of music played by some NPR stations and other noncommercial webcasters, it has not presented any evidence that NPR stations (the vast majority of which have usage below the 159,140 ATH threshold) are equally substitutional for commercial stations as the noncommercial Christian broadcasters paying the vast majority of statutory royalties. *See* SX PFFCL ¶ 1502; *supra* Resp. to ¶¶ 127, 137. Given the potential for diversion to the large noncommercial Christian broadcasters, "economic logic dictates" that noncommercial webcasters above the ATH threshold pay commercial rates for their excess usage. *Web IV*, 81 Fed. Reg. at 26395.

Response to ¶ 199. Just one noncommercial webcaster that is not a Christian music station paid per-performance royalties for usage above the 159,140 ATH threshold in 2018. That webcaster was [redacted]. Ex. 5625 ¶ 46 nn.38-39, App. E (Ploeger WRT).

[7] Calculated as 2018 per-performance royalty payment of [redacted] × 2/3. Ex. 5625, App. E (Ploeger WRT).

Because it paid just [ ] of the total noncommercial webcaster statutory royalty payments in 2018, it would be inappropriate to generalize from it to the Christian music stations that pay the vast majority of noncommercial webcaster statutory royalties. *See supra* Resp. to ¶ 174. Moreover, NRBNMLC has made no effort to assess its usage as compared to NPR stations, or the potential for diversion from commercial stations to either NPR stations or [ ]. *See supra* Resp. to ¶¶ 127, 137.

Response to ¶ 200. NRBNMLC's description of Exhibit 3038 is very misleading. That exhibit [ ]. In short, it looks a lot like the data the Judges reviewed in *Web IV* and found to validate the 159,140 ATH threshold. *Web IV*, 81 Fed. Reg. at 26393.

D. There Is Substantial Evidence of the Competition between Large Noncommercial Webcasters and Commercial Services That Underlies the Judges' Past Noncommercial Webcaster Rate Decisions

Response to ¶ 201. The Judges have been clear and consistent about the rationale for the statutory royalty rate for noncommercial webcasters that has been in place since *Web II*. *See* SX PFFCL ¶¶ 1349-63. Summarizing briefly, they have recognized noncommercial webcasters as a distinct group, but only to a point, and adopted a rate structure that provides all of them effective rate discounts relative to commercial rates. However, they have also recognized that "[m]usic programming found on noncommercial stations competes with similar music programming found on commercial stations." *Web II*, 72 Fed. Reg. at 24098. There is ample evidence in the record that commercial and noncommercial webcasters compete directly for listeners, as well as that

broadcasters compete with internet-only services. *See* SX PFFCL ¶¶ 1065-73, 1376-1414. And as Mr. Orszag explained at trial, it is self-evident that "if you play more music [than] play less music, you're more likely to take away share from somebody who is playing the same music." 8/13/20 Tr. 1995:5-8 (Orszag). Consistent with that observation, the Judges have provided declining effective rate discounts for larger noncommercial webcasters by requiring them to pay per-performance royalties at commercial rates for usage in excess of the 159,140 ATH threshold. *See supra* Resp. to ¶ 186.

1. There Is Significant Potential for Noncommercial Cannibalization of Commercial Service Listeners

a. NRBNMLC's Recapitulation of its Buyer-Side Arguments about Nonprofit Objectives and Alleged Constraints Continues to Ignore the Seller Side of the Equation

Response to ¶ 202. SoundExchange incorporates its response to ¶ 201 *supra*. And as acknowledged by NRBNMLC's expert Professor Cordes, even if a noncommercial webcaster did not set out to compete with commercial webcasters, the noncommercial webcaster could compete with commercial webcasters "simply by growing large because of its popularity." 8/20/20 Tr. 3275:4-3276:16 (Cordes). NRBNMLC's witnesses' general and theoretical observations concerning the nature of noncommercial webcasters are insufficient to negate the possibility of listener diversion from commercial to noncommercial services. *See supra* Resp. to ¶¶ 44-110.

Response to ¶¶ 203-06. SoundExchange incorporates its response to ¶ 202 *supra*.

b. Noncommercial and Commercial Webcasters Compete for Listeners

Response to ¶ 207. The large noncommercial webcasters that pay the vast majority of noncommercial webcaster statutory royalties seek to reach an audience to advance their missions and monetize an audience. The way they do that is by playing contemporary Christian music by

popular artists. This music is integral to their programming and is the same music used by commercial religious broadcasters. *See supra* Resp. to ¶¶ 60-72 *supra*.

Response to ¶ 208. The financial viability of both noncommercial webcasters and commercial webcasters depends on providing programming that will appeal to and generate an audience that can be monetized. *See supra* Resp. to ¶¶ 49, 60, 63. While the relationship between audience size and revenue is more direct in the case of commercial services, listener donations to noncommercial services increase as audience size increases and listeners are converted to fans to ultimately donors. *See supra* Resp. to ¶¶ 63, 76-77. Both noncommercial and commercial religious broadcasters provide a similar user experience. *See supra* Resp. to ¶¶ 61-62. This involves playing a lot of the same popular contemporary Christian music. *See supra* Resp. to ¶ 65; SX PFFCL ¶¶ 1385-1414.

Response to ¶ 209. SoundExchange incorporates its response to ¶ 208 *supra*.

Response to ¶ 210. The theories espoused by NRBNMLC's experts for why commercial and noncommercial stations might not compete with each other do not conform to observed reality. EMF is "engaged in aggressive growth mode." Ex. 5625 ¶ 22 (Ploeger WRT). As part of that growth, it acquired an Atlanta radio station and changed its format to contemporary Christian music even though the Atlanta market was already served by two contemporary Christian music stations. Press at the time noted that "Atlanta has suddenly become a hotbed of Christian radio competition," with the competition including "[a]ll three stations . . . simultaneously running aggressive billboard campaigns." *See* SX PFFCL ¶ 1408.

Response to ¶ 211. Prazor [[redacted]]. Ex. 5625 ¶ 9 n.2 (Ploeger WRT). As a

result, [redacted]. *Id.* ¶ 46 n.38, App. E (Ploeger WRT). Given the nature of its programming, it is easy to see how it competes directly with similar internet-only services, and that competition would be significant if its usage were higher. In a free market, a record company would be mindful of the potential for competition with services like Pandora and Sirius XM, and there is no apparent reason the record company would choose to support Prazor over services like Pandora and Sirius XM by agreeing to lower royalty rates for Prazor than Pandora or Sirius XM simply because Prazor has chosen to rely on donations rather than pursuing the more remunerative business models of selling advertisements or subscriptions. *See* SX PFFCL ¶¶ 1101-02, 1376-78, 1415-17. When UMG does a deal for UMG's entire catalog, it does not distinguish between noncommercial and commercial webcasters in setting or negotiating rates or terms. Ex. 5610 ¶ 22 (Harrison WRT). To the contrary, it is concerned with the business models of its licensees and [redacted]. *See* Ex. 5609 ¶ 66 (Harrison WDT).

c. NRBNMLC's Theories about Listener Diversion Miss the Point

Response to ¶ 212. NRBNMLC presents no empirical evidence, and only the tiniest bit of speculation, to support its theories about where noncommercial station listeners might come from. To the extent that these theories depend on noncommercial webcasters limiting their webcasting, NRBNMLC has presented no evidence that any noncommercial webcasters, other than Family Radio, have imposed limitations to manage their royalty expense. *See supra* Resp. to ¶ 193.

More fundamentally, even if there was some truth to these theories, they miss the point. Taking Family Radio for example, NRBNMLC trumpets that when it pulled out of the Buffalo, NY broadcast market, its webcast listenership in Buffalo jumped. NRBNMLC PFFCL ¶ 103. However, once Family Radio pulled out of the Buffalo broadcast market, it is of no consequence

to a record company's licensing decisions that those listeners formerly listened to Family Radio over the air. They are now listening to Family Radio online, and if they are going to listen to Christian music online because they can no longer get that kind of programming on the radio, or they wish to listen on a digital device, a record company would rather have them listen to the simulcast of a commercial Christian radio station or a commercial service like Pandora or Sirius XM. Thus, there is no reason for a record company to support Family Radio's migration from broadcasting to online listening with lower rates. More generally, a listener will only listen to one service at a time. A record company would rather have that be a higher-paying service. *See* SX PFFCL ¶¶ 1376-80, 1415-18.

Response to ¶ 213. NRBNMLC also presents no empirical evidence for its theory that a lower royalty rate would result in additional simulcast listening by "brand new listener[s]" or a different radio broadcaster's over-the-air listeners. And NRBNMLC's argument again misses the point. A record company would rather have a new listener listen to a higher-paying service than a lower-paying service, and so is unlikely to provide a substantial discount to a noncommercial service playing a lot of music that is similar to music played on commercial services. *See supra* Resp. to ¶ 212.

Response to ¶ 214. The possibility of listeners switching between noncommercial services is uninformative as to what noncommercial services should pay relevant to commercial services. Again, a record company would rather have a new listener listen to a higher-paying service. *See supra* Resp. to ¶¶ 212-13.

Response to ¶ 215. The Judges should ignore NRBNMLC's arguments about the likelihood of listeners switching between platforms and the effects of substitution, because

NRBNMLC has not presented empirical evidence for any of its theories and those theories do not support a lower royalty rate for noncommercial webcasters. *See supra* Resp. to ¶¶ 212-14.

2. NRBNMLC Has Failed to Establish That in a Free Market Noncommercial Webcasters Would Obtain Larger Effective Rate Discounts Than They Already Get

Response to ¶ 216. The Judges' clear and consistent rationale for the statutory royalty rate structure for noncommercial webcasters is that "[m]usic programming found on noncommercial stations competes with similar music programming found on commercial stations." *Web II*, 72 Fed. Reg. at 24098. In a free market, a record company would be mindful of the potential for competition, and not extend lower rates to noncommercial services. *See* SX PFFCL ¶¶ 1376-78, 1415-17. Given that that, "economic logic dictates" that noncommercial webcasters above the ATH threshold pay commercial rates for their excess usage. *Web IV*, 81 Fed. Reg. at 26395; *see, e.g., supra* Resp. to ¶¶ 44, 82, 88, 91, 196, 201-02.

Response to ¶ 217. Notwithstanding the potential for competition, the current statutory royalty rate structure for noncommercial webcasters provides all noncommercial webcasters significant effective rate discounts as compared to commercial webcasters. *See* SX PFFCL ¶¶ 1366-71, 1419-27; *supra* Resp. to ¶¶ 44, 82, 91, 186, 189, 201. NRBNMLC has failed to provide any useful evidence that they would get greater discounts in a free market. *See* SX PFFCL ¶¶ 1374, 1415-18; *supra* Resp. to ¶¶ 44, 71, 84-89, 216.

Response to ¶ 218. While the testimony of both Professors Steinberg and Cordes regarding the price elasticity of noncommercial webcasters is purely theoretical, more use of recordings by noncommercial webcasters, without ads, driven by lower rates, would provide noncommercial webcasters a further competitive advantage over commercial webcasters in attracting listeners, and thus risk more diversion from commercial services. *See supra* Resp. to ¶¶ 58, 61-62, 71.

3. NRBNMLC Has Failed to Establish That the Judges Erred in Their Previous Conclusions Concerning Competition between Commercial and Noncommercial Services

Response to ¶ 219. The Judges have consistently and unambiguously held that "[m]usic programming found on noncommercial stations competes with similar music programming found on commercial stations." *Web II*, 72 Fed. Reg. at 24098; *see also Intercollegiate Broad. Sys.*, 574 F. 3d at 768 ("competition certainly would affect the actions of a willing seller"; *supra* Resp. to ¶¶ 186, 201-02, 216. As a result, "economic logic dictates" that noncommercial webcasters with usage above the ATH threshold pay commercial rates for their excess usage. *Web IV*, 81 Fed. Reg. at 26395. As the participant challenging those holdings, and proposing a significantly different rate structure as a result, it is NRBNMLC that has the burden of coming forward with sufficient evidence to justify its proposal. *See id.* at 26320. Instead, it has provided only the unsupported assertions of its witnesses that the programming provided by noncommercial Christian music stations is nothing like the programming provided by commercial webcasters. These assertions are not based on any empirical evidence. *See supra* Resp. to ¶ 89. They are also not true. SoundExchange has presented substantial evidence that commercial and noncommercial webcasters compete for listeners with services that are not clearly differentiated. *See* SX PFFCL ¶¶ 1376-79, 1381-1414. There is also evidence that broadcaster simulcasts compete with internet-only services. *See id.* ¶¶ 1065-73.

Response to ¶ 220. SoundExchange incorporates its response to ¶ 219 *supra*.

Response to ¶ 221. There is no evidence that any noncommercial webcaster has ever sought a direct license from a record company, because noncommercial services have always been content to rely on the large discounts from commercial rates that they get under the statutory license. *See supra* Resp. to ¶ 111. And there is nothing that a record company can do to prevent a noncommercial webcaster from relying on the statutory license. 17 U.S.C. § 114(f)(3)(B). As a

result, it would have been quite surprising if a record company had ever conducted a study of programming on noncommercial services or diversion to noncommercial services. To the extent record companies have ever had occasion to consider licensing to noncommercial services, their thinking has been that they would not be interested in discounting their rates if they were to be approached about a license. Ex. 5609 ¶ 80 (Harrison WDT).

Response to ¶ 222. SoundExchange incorporates its response to ¶ 221 *supra*.

Response to ¶ 223. It would have been surprising if noncommercial webcasting had come up in Mr. Piibe's negotiations with services like Spotify, since such negotiations concern the terms of agreements for licensing the commercial services involved. *See* SX PFFCL ¶¶ 412-56; *see also supra* Resp. to ¶ 221.

4. NRBNMLC Has Failed to Establish That Noncommercial Simulcasting Enhances, Rather than Cannibalizes, Record Companies' Streams of Revenue

Response to ¶ 224. SoundExchange incorporates its response to ¶ 212 *supra*.

Response to ¶ 225. As NRBNMLC acknowledges, the Hauser Survey is "not directly related to noncommercial broadcasting." It is also fatally flawed. *See* SX PFFCL ¶¶ 1208-69.

5. Music Programming on Noncommercial Stations Competes with Similar Music Programming on Commercial Services

a. Similarities in Programming Suggest Listener Diversion

Response to ¶ 226. As Mr. Orszag explained at trial, it is self-evident that "if you play more music [than] play less music, you're more likely to take away share from somebody who is playing the same music." SX PFFCL ¶ 1376. The Judges' have embraced this self-evident truth, holding that "[m]usic programming found on noncommercial stations competes with similar music programming found on commercial stations." *Web II*, 72 Fed. Reg. at 24098. As a result, it is NRBNMLC that has the burden of coming forward with sufficient evidence to justify its rate

proposal. Nonetheless, there is ample evidence that commercial and noncommercial webcasters compete for the attention of listeners with undifferentiated programming. *See supra* Resp. to ¶ 219.

Response to ¶ 227. The large noncommercial webcasters paying the vast majority of noncommercial webcaster statutory royalties are doing what the Judges predicted in *Web II*: reaching beyond their "limited geographic audience" to "compete with commercial webcasters even 'worldwide.'" *Web II*, 72 Fed. Reg. 24098. Most notably, EMF's K-LOVE network, a contemporary Christian music channel that [[redacted]], *see* SX PFFCL ¶ 1368, is a national service that broadcasts the same programming in hundreds of local radio markets and uses webcasting to fill in the gaps in its terrestrial radio coverage and make its programming available to users on a broader range of devices. Ex. 5625 ¶ 22 (Ploeger WRT); *see* SX PFFCL ¶¶ 1074-79. Similarly, Family Radio is pursuing a strategy of migrating from terrestrial broadcasting to webcasting. For example, that strategy allowed it to enlarge its webcasting audience in Buffalo, NY as it sold its terrestrial radio station in that market. *See supra* Resp. to ¶¶ 10, 103, 212. It is possible that noncommercial stations paying only the minimum fee, [[redacted]], may have a more limited geographic reach as well as a smaller audience in general, but that is not relevant to the question of what large noncommercial webcasters pay for usage above the 159,140 ATH threshold.

Response to ¶ 228. Fans of contemporary Christian music have a range of listening options, including noncommercial simulcasts, noncommercial internet-only services like Prazor, commercial simulcasts, and other commercial services like Sirius XM and Pandora. *See* SX PFFCL ¶ 1393; *supra* Resp. to ¶ 211. And as between commercial and noncommercial simulcasts, the noncommercial options have a competitive advantage in the form of no advertising and more

recordings per hour. *See supra* Resp. to ¶¶ 58, 61-62, 71. When listeners choose a noncommercial option, they are not listening to a commercial outlet for the same music. In a free market, a record company would be mindful of the potential for competition, and not extend noncommercial services greater discounts than they are already getting. *See* SX PFFCL ¶¶ 1376-78, 1415-17.

b. The Mediabase Playlist Data Is Compelling Evidence of the Substantial Overlap in Music Played by Commercial and Noncommercial Religious Broadcasters

(1) NRBNMLC Puts Forth Irrelevant Criticisms of the Mediabase Data

Response to ¶ 229. Throughout this proceeding, NRBNMLC witnesses have attempted to minimize the similarity in music programming between commercial and noncommercial religious broadcasters. *E.g.*, NRBNMLC PFFCL ¶¶ 61, 67-68. For example, Professor Steinberg testified that "[s]tatutory NCE webcasters . . . are mostly religious in orientation, differing from commercial webcasters in the music they play . . . and in their willingness to promote new niche and noncommercial recordings that bind listener-donors to their cause." Ex. 3060 ¶ 49 (Steinberg AWDT). However, these assertions are not based on any empirical analysis of the music actually played. *E.g.*, 8/26/20 Tr. 4048:10-14, 4048:18-20, 4049:18-23, 4050:3-8, 4051:1-5, 4051:22-4052:2, 4052:17-23 (Steinberg). In the hope that the Judges would base their understanding of the music used by the largest noncommercial webcasters solely on the unsubstantiated assertions of its economists, NRBNMLC fought tooth and nail to keep out of the record the most comprehensive available data about what music religious broadcasters actually play—a full quarter of playlist data downloaded from iHeart's Mediabase for samples of 10 commercial religious broadcasters and 10 noncommercial religious webcasters. *See Order Denying NRBNMLC Motion to Strike* (Apr. 2, 2020). That data shows a very high degree of overlap between the music played by commercial and noncommercial stations. *See* Ex. 3040; SX PFFCL ¶¶ 1399-1402. NRBNMLC now lodges

various attacks against the data, but these are irrelevant. One need only take a look at the raw data in Exhibit 3040 to see that there is much more overlap in the music played by commercial and noncommercial stations than the unsubstantiated assertions of NRBNMLC's witnesses indicate.

Response to ¶ 230. That Mr. Ploeger and Mr. Orszag weren't intimately involved in the process of downloading and summarizing the Mediabase data or couldn't remember all the details about which NRBNMLC's counsel inquired is immaterial. See 8/13/20 Tr. 2019:11-12 (Orszag) ("I haven't looked at Mr. Ploeger's testimony in quite some time"). The data convey a strong message about the similarity of music on commercial and noncommercial Christian music stations, and the process of downloading the data was straightforward. SoundExchange focused on Christian contemporary music because that is the relevant format, since contemporary Christian music stations pay the vast majority of noncommercial webcaster statutory royalties. *See* SX PFFCL ¶ 1397. It looked to Mediabase because that is an industry-standard airplay monitoring database where one finds playlist data. *See id.* ¶ 1396. It randomly selected an equal number of commercial and noncommercial stations from among the available options so it could make the kinds of comparisons presented without being accused of cherry-picking. *See id.* ¶¶ 1398-1400. And it downloaded data for the third quarter of 2019 because it was the last complete quarter before Mr. Ploeger's written rebuttal testimony was filed and wouldn't simply reflect everyone playing Christmas music. *See id.* ¶ 1398. Given the striking similarity of the stations' playlists, it would be surprising if the choice of a few more or fewer stations or the selection of a different period would have materially affected the results. *See* Ex. 3040.

Response to ¶ 231. While NRBNMLC's counsel has tried to sow confusion by suggesting that perhaps SoundExchange should have looked at genres of music other than Christian contemporary music, that would have been pointless, because contemporary Christian music

stations pay the vast majority of noncommercial webcaster statutory royalties. *See* SX PFFCL ¶ 1397; 9/9/20 Tr. 5806:10-15 (Ploeger). While there are noncommercial webcasters paying the minimum fee that use music from a variety of genres, *see supra* Resp. to ¶ 198, a comparison of use of that music would have shown nothing relevant to royalties payable by noncommercial webcasters with usage over the 159,140 ATH threshold. That Mr. Ploeger wasn't intimately involved in the downloading the data or couldn't remember all the details about which NRBNMLC's counsel inquired is immaterial.

Response to ¶ 232. NRBNMLC completely plucks out of context a statement Mr. Orszag made in response to a question posed by NRBNMLC's counsel about "litigation experiments." *See* 8/13/20 Tr. 2038:4-9. (Orszag). As Mr. Orszag explained, experiments try to "replicate the real world in behavior of consumers" and "nothing in [his] written direct or written rebuttal testimony in this case involves an experiment." 8/13/20 Tr. 2038:20-2039:21 (Orszag). The so-called LSEs were an experiment (albeit a flawed one). *See* SX PFFCL ¶¶ 852-56. "[T]ak[ing] away the non-commercial broadcasters in Atlanta and [seeing] how are consumers going to behave" would be an experiment. 8/13/20 Tr. 2039:10-13 (Orszag). Downloading some playlist data from a commercial database and summarizing it is not an experiment.

Response to ¶ 233. SoundExchange incorporates its response to ¶ 231 *supra*.

Response to ¶ 234. To be sure, the stations monitored by Mediabase are not expected to be representative of the broader universe of all stations in the U.S., as Mediabase is focused on larger stations and not every "mom-and-pop" station. 8/13/20 Tr. 2025:13-18 (Orszag). However, the "mom-and-pop" stations are the ones paying only the minimum fee. Thus, "the structure of payments" makes it unnecessary to look for data about the broader group. *See* 8/13/20 Tr. 2026:18-2027:1 (Orszag). The playlists downloaded from Mediabase included stations operated by [redacted]

[redacted]

[redacted]

[redacted]]. Ex. 5625 ¶ 22, App. C & E (Ploeger WRT).

Response to ¶ 235. SoundExchange incorporates its response to ¶ 234 *supra*.

Response to ¶ 236. Mr. Ploeger testified that "[t]he stations were selected from the group of Christian AC stations that Mediabase monitors through a process involving random draws and confirmation of the status of the stations as commercial or noncommercial." Ex. 5625 ¶ 25 (Ploeger WRT); *see also* 9/9/20 Tr. 5805:8-13, 5844:15 (Ploeger). That he didn't know or couldn't remember what technology was used to perform the randomization or other details of the draw process is irrelevant, since it is undisputed that the stations for which playlist data was downloaded were selected randomly and not cherry-picked, and the playlists are all notably similar. *See supra* Resp. to ¶ 229.

Response to ¶ 237. Although five of the ten commercial stations are owned by Salem, the five stations are different. 9/9/20 Tr. 5851:8-14 (Ploeger). This is apparent from Exhibit 3040, which shows that while the recordings used on the Salem stations are similar to each other (as well as to the other 15 stations), they are not the same. Ex. 3040 (Tabs [redacted]); Ex. 5625, App. C (Ploeger WRT). Salem is the leading commercial Christian broadcaster. *Id.* ¶ 22.

Response to ¶ 238. NRBNMLC confuses the purpose of the Mediabase data. SoundExchange presented the Mediabase data to provide empirical evidence concerning the extent of the overlap of Christian music played on commercial and noncommercial Christian music stations in general, which is extensive. *Id.* ¶ 25. It was not a goal to establish direct competition

between these particular stations, although simulcasting does enable noncommercial stations to "compete with commercial webcasters even 'worldwide.'" *Web II*, 72 Fed. Reg. 24098.

Response to ¶ 239. As Mr. Orszag testified, while a recording was counted as overlapping if played by at least one station in each group, the full data includes the frequency of plays of particular recordings between the two groups, which is substantial for the top played recordings. 8/13/20 Tr. 2033:21-2034:2 (Orszag); Ex. 3040. It would not be possible for the overlapping recordings to constitute 97.4% of the total plays on the commercial stations and 97.7% of the total plays on the noncommercial stations if there were only scattershot usage like NRBNMLC suggests. *See* SX PFFCL ¶ 1400. The top recordings for each station were generally played at least about half a dozen times a day on average over the 92 day quarter, so it would be impossible to have the extreme distributions suggested by NRBNMLC as well. *See* Ex. 3040. The most-played recording overall was played between about four and seven times a day on each station on average over the quarter. *See* SX PFFCL ¶ 1402.

Response to ¶ 240. SoundExchange incorporates its response to ¶ 238 *supra*.

(2) It Is NRBNMLC's Burden to Come Forward with Evidence Establishing the Comparability of Its Proposed CBP/NPR Benchmark

Response to ¶ 241. As the proponent of a CPB/NPR benchmark that the Judges have twice rejected and a significant change in the statutory rate structure alleged to be justified by that benchmark, NRBNMLC has the burden of coming forward with sufficient evidence to establish the comparability of its benchmark and support its rate proposal. *See supra* Resp. to ¶¶ 120-22. Making some effort to assess similarity in programming and the risk of diversion between its proposed benchmark market and the target market, and to evaluate potential adjustments, would have been an appropriate thing for NRBNMLC to have done. Its failure to address such

considerations is among the reasons its proposed benchmark must be rejected again. *See supra* Resp. to ¶ 137.

It was not SoundExchange's responsibility to come forward with evidence that NRBNMLC's twice-rejected CPB/NPR benchmark is *non*-comparable. In fact, it was not apparent at the time SoundExchange filed its written rebuttal statement that NRBNMLC was even proposing a CPB/NPR benchmark. NRBNMLC originally proposed a system of tiered rates, which it justified on the basis of SoundExchange's settlement with CBI. Ex. 3061 ¶¶ 33-37 (Cordes CWDT); *see* SX PFFCL ¶¶ 1467-68. Professor Steinberg advocated that approach, and as a "fallback" suggested a one third of commercial rates ratio anchored in RIAA's *Web I* rate proposal. *See* SX PFFCL ¶ 1473. While his Amended Written Direct Testimony, which was filed just four weeks before rebuttal cases, had more to say about the CPB/NPR settlement than the September 2019 version of his testimony (which had very little to say about it), the CPB/NPR settlement played no role whatsoever in his discussion of NRBNMLC's rate proposal. Ex. 3060 ¶¶ 9, 29-39, 54-65 (Steinberg AWDT); *see also* Ex. 5605 ¶ 117 (Tucker CWRT) (dismissing the discussion of the CBI and NPR settlements that Professor Steinberg added to his written direct testimony as irrelevant to NRBNMLC's rate proposal). Professor Steinberg's rebuttal testimony had more to say about the NPR/CPB settlement, Ex. 3064 (Steinberg CWRT), but of course SoundExchange's rebuttal case was filed the same day. NRBNMLC did not file a rate proposal embodying the CPB/NPR settlement discussion added to Professor Steinberg's written direct testimony until the eve of trial. NRBNMLC Amended Proposed Rates and Terms (filed July 31, 2020). As a result of the gradual unveiling of the proposed CPB/NPR benchmark that became central to NRBNMLC's case at trial, SoundExchange was quite hampered in its ability to respond.

Response to ¶¶ 242-43. SoundExchange incorporates its response to ¶ 241 *supra*.

6. The CPB/NPR Settlement Does Not Demonstrate That Record Companies are Willing to Accept Lower Rates from Non-NPR Noncommercial Webcasters

Response to ¶ 244. Mr. Orszag's justification for charging commercial rates for above-threshold usage by noncommercial webcasters is the same as the Judges': "economic logic dictates" it. *Web IV*, 81 Fed. Reg. at 26395. SoundExchange has addressed at length the reasons why NRBNMLC's proposed CPB/NPR benchmark is non-comparable to the hypothetical market for which the Judges must set rates in this proceeding and does not justify NRBNMLC's rate proposal. *See* SX PFFCL ¶¶ 1482-1527; *supra* Resp. to ¶¶ 120-85.

Response to ¶ 245. Competition between the noncommercial contemporary Christian music stations that pay the vast majority of noncommercial webcasting statutory royalties and commercial services that play the same music is highly relevant, because that competition is the rationale for the statutory royalty rate structure that has been in place since *Web II*. *See, e.g.*, SX PFFCL ¶ 1502; *supra* Resp. to ¶ 44. NRBNMLC should have assessed whether there is similar competition between NPR stations and commercial services if it wanted to establish the comparability of its proposed CPB/NPR benchmark, but it chose not to do so. *See* SX PFFCL ¶ 1502; *supra* Resp. to ¶ 241.

Response to ¶ 246. The *Web II* determination mentions both NPR and NRBNMLC, because both participated in the litigation of that proceeding. *Web II*, 72 Fed. Reg. at 24084. However, the Judges' conclusion that "[m]usic programming found on noncommercial stations competes with similar music programming found on commercial stations" was not linked or in any way limited to NPR. *Web II*, 72 Fed. Reg. at 24098.

Response to ¶ 247. SoundExchange incorporates its response to ¶ 244 *supra*. Additionally, the Judges must disregard NRBNMLC's references to agreements pursuant to the Webcaster

Settlement Acts of 2008 and 2009, and comparisons thereto, because those were non-precedential agreements that cannot be taken into account in rate proceedings. 17 U.S.C. § 114(f)(4)(C).

E. Charging Noncommercial Webcasters a Lower Marginal Rate above the Threshold Would Result in Additional Competition between Noncommercial and Commercial Services

Response to ¶ 248. Professor Cordes' suggestion that noncommercial webcasters are "high elasticity demanders," willing to stream more sound recordings if offered at a lower price, Ex. 3061 ¶ 23, would result in more songs played per hour, without ads, by noncommercial webcasters and a greater competitive advantage over commercial services. In a free market that is not a result that copyright owners would support. *See supra* Resp. to ¶¶ 58, 61-62, 71.

Response to ¶ 249. The mere fact that a noncommercial webcaster has a mission and is subject to different legal constraints than commercial webcasters does not preclude competition between the two. *See supra* Resp. to ¶ 53. When the mission of a nonprofit involves playing music to the public in competition with commercial services, that is not a mission a copyright owner would likely choose to support with lower rates in a free market. *See supra* Resp. to ¶¶ 49, 89, 248.

F. Effective Rates for Noncommercial Rates Reflect a Substantial Discount from Commercial Rates

Response to ¶ 250. Large noncommercial webcasters with usage that exceeds the 159,140 ATH threshold do not constitute a distinct market segment. *See supra* Resp. to ¶¶ 82-89, 186. Nonetheless, NRBNMLC argues that fundamental differences between for-profit and nonprofit entities warrant price discrimination in favor of all nonprofits. *E.g.*, NRBNMLC PFFCL ¶¶ 73, 82, 91-93. Although it is difficult to square NRBNMLC's argument with economic theory, the current statutory royalty rate structure is responsive to NRBNMLC's arguments by providing effective rate discounts to all noncommercial webcasters. *See supra* Resp. to ¶¶ 44, 82, 91; *Web IV*, 81 Fed. Reg. at 26392 n.208 (the discount on the first 159,140 ATH of monthly usage "results in

noncommercial webcasters paying a lower average per-play rate than a commercial webcaster (that pays at the commercial rate for every performance).").

Response to ¶ 251. Professor Tucker explained that [ ] 8/17/20 Tr. 2205:15-18, 2207:2-12 (Tucker). While Professor Tucker acknowledged that [ ] 8/17/20 Tr. 2207:13-2208:4 (Tucker); *see supra* Resp. to ¶ 194. In setting a willing buyer/willing seller rate it is necessary to look at the seller side as well. *See supra* Resp. to ¶ 44. Considering the sellers' side of the equation, "economic logic dictates" that "the Judges apply commercial rates to noncommercial webcasters above the ATH threshold." *Web IV*, 81 Fed. Reg. at 26395.

Response to ¶ 252. SoundExchange has addressed at length the reasons why NRBNMLC's proposed CPB/NPR benchmark is non-comparable to the hypothetical market for which the Judges must set rates in this proceeding and does not justify NRBNMLC's rate proposal. *See* SX PFFCL ¶¶ 1482-1527; *supra* Resp. to ¶¶ 120-85.

G. Claims of Obstruction of Mission Are Incorrect and Irrelevant to the Willing Buyer/Willing Seller Rate Standard

Response to ¶ 253. NRBNMLC has provided vanishingly little evidence of noncommercial webcasters limiting their webcasting, and no evidence at all that the decision by large noncommercial webcasters to buy sound recording rights at commercial rates for usage above the 159,140 ATH threshold does anything other than advance their mission of reaching an audience with compelling music programming. *See supra* Resp. to ¶¶ 49, 89, 212.

Statutory royalties are simply not material to the finances of the large noncommercial webcasters that pay the vast majority of noncommercial webcaster statutory royalties. *See* SX PFFCL ¶ 1433. In 2018, EMF had a financial surplus of almost $55 million. Ex. 5238 at 6. For the five noncommercial webcasters with the most usage above the threshold, statutory royalties accounted for [redacted] of their total expenses, [redacted] of their program expenses, and [redacted] of their revenues in 2018. SX PFFCL ¶ 1433. Using 2018 numbers, SoundExchange's proposal to increase minimum fees to $1,000 per channel or station and the commercial rates payable for performances in excess of 159,140 ATH per month to $0.0028 per performance would have increased the statutory royalties paid by the five noncommercial webcasters with the highest usage to at most [redacted] of total expenses, [redacted] of program expenses, and [redacted] of revenues. SX PFFCL ¶ 1434. Even if statutory royalties were material to large noncommercial webcasters—and they are not—the concept of mission obstruction is purely a buyer-side construct. When the mission of a nonprofit involves transmitting music to the public in competition with commercial services, that is not a mission a copyright owner would likely support with lower rates in a free market. *See supra* Resp. to ¶¶ 49, 89, 248.

NRBNMLC's comparisons to NPR stations are meaningless, because the proposed CPB/NPR benchmark is non-comparable. *See* SX PFFCL ¶¶ 1482-1527; *supra* Resp. to ¶¶ 120-85. Among other things, NPR stations do not pay *any* statutory royalties, because CPB pays them with federal government money. *See supra* Resp. to ¶¶ 121, 131.

Response to ¶ 254. Family Radio may face financial hardship, but NRBNMLC is mistaken about the cause. Family Radio's financial situation is the result of unique circumstances that include failed doomsday predictions and programming antagonistic to the organized church. *See* SX PFFCL ¶¶ 1441-46. Its 2018 statutory royalties constituted only [redacted] of its 2018 revenues

and [ ] of its 2018 program expenses. *See supra* Resp. to ¶ 192. While Family Radio's online listenership may be increasing, that is the result of a decision to migrate away from its aging and expensive terrestrial broadcasting infrastructure and use webcasting to reach its audience instead. That has allowed it to reduce its costs of broadcasting and free up money that was previously tied up in its broadcast infrastructure. *See* SX PFFCL ¶ 1430.

Response to ¶ 255. SoundExchange incorporates its responses to ¶¶ 253-54 *supra*.

IX. THE JUDGES SHOULD ADOPT SOUNDEXCHANGE'S PROPOSED RATES FOR NONCOMMERCIAL WEBCASTERS

A. The Judges Should Continue the Current Statutory Royalty Rate Structure for Noncommercial Webcasters while Increasing the Per-Performance Royalty and Minimum Fee

Response to ¶ 256. NRBNMLC is right that there is a gap between the current statutory royalty rates and the rates that copyright owners would receive in free market transactions, but it is wrong about the direction rates must move to correct that disparity. For all the reasons that the Judges rejected NRBNMLC's buyer-focused pleas for lower rates and its non-comparable CPB/NPR benchmark the last two times NRBNMLC made similar arguments, the Judges must do so again. Instead, the Judges should continue the same statutory royalty rate structure that they adopted in *Web II*, *Web III* and *Web IV*, for all the same reasons they adopted it in those proceedings. *See* SX PFFCL ¶¶ 1375-80, 1482-1527; *supra* Resp. to ¶¶ 44, 120-21, 137-38. SoundExchange's economic case demonstrates that the current statutory royalty rate for commercial webcasters and for noncommercial webcasters with usage over the 159,140 ATH threshold is well below the rate that copyright owners would receive in a free market transaction, so that rate must increase. *See* SX PFFCL ¶¶ 65-842. The Judges should also increase the minimum fee to reflect the significant increase in SoundExchange's per-channel or per-station costs over time. *See id.* ¶¶ 1530-66.

The Judges must disregard NRBNMLC's references to the non-precedential Webcaster Settlement Act agreement and changes in rates relative to the 2015 rate under that agreement, because the rates in such agreements are not to be taken into account in rate proceedings. 17 U.S.C. § 114(f)(4)(C).

Response to ¶ 257. While there is no market for licensing noncommercial services because noncommercial webcasters have always been content to rely on the statutory license, SoundExchange's proposal to continue the rate structure the Judges devised in *Web II* and continued in *Web III* and *Web IV* is not a "seller-side demand." Rather, it simply reflects that if one does not ignore the seller side as NRBNMLC would prefer, economic logic dictates that structure. *See supra* Resp. to ¶¶ 44, 82, 111.

Response to ¶ 258. NRBNMLC's comparisons between NPR and non-NPR noncommercial broadcasters are not informative, because the proposed CPB/NPR benchmark is non-comparable. *See* SX PFFCL ¶¶ 1482-1527; *supra* Resp. to ¶¶ 120-85. Among other things, NPR noncommercial broadcasters do not actually pay *any* statutory royalties, because CPB pays them with federal government money. *See supra* Resp. to ¶¶ 121, 131. So far as statutory royalties are concerned, it would seem prudent for noncommercial broadcasters eligible to affiliate with NPR to do so.

B. To the Extent It Is Relevant under the Willing Buyer/Willing Seller Standard, Noncommercial Webcasters Are Well Positioned to Pay Higher Rates

Response to ¶ 259. SoundExchange agrees with NRBNMLC that ability to pay is not relevant to the willing buyer/willing seller standard. *See* SX PFFCL¶¶ 1292. However, NRBNMLC has invested considerable energy in pleading poverty on behalf of noncommercial webcasters. *E.g.*, NRBNMLC PFFCL ¶¶ 11, 21-22, 30, 31, 39-43, 50, 80, 193-195, 254-55. To the extent that the financial health of noncommercial webcasters may be relevant, data shows that the

five noncommercial webcasters with the highest amounts of usage over the 159,140 ATH threshold, which account for the vast majority of per-performance royalties paid, are well positioned to pay higher rates. *See* SX PFFCL¶¶ 1431-34.

Response to ¶ 260. SoundExchange agrees with NRBNMLC that it would be inappropriate to consider the financial health of a noncommercial webcaster like Family Radio. *See supra* Resp. to ¶ 259 *supra*.

Response to ¶ 261. SoundExchange incorporates its response to ¶ 259 *supra*.

Response to ¶ 262. The five largest noncommercial webcasters have made a choice to simulcast because it is in their interest to do so in pursuit of their missions as consumer use of digital devices increases. *See* NRBNMLC PFFCL ¶¶ 53-56, 63; SX PFFCL¶¶ 1074-80, 1114. For Family Radio, it was also part of a strategy of cutting costs and realizing value formerly tied up in its aging and expensive terrestrial broadcasting infrastructure. *See* SX PFFCL ¶ 1430. Relative to internet-only noncommercial webcasters, they enjoy cost savings and synergies based on their simulcast business model. *See id.* ¶¶ 1105-06. While all noncommercial webcasters must pay a willing buyer/willing seller royalty when they choose to webcast in pursuit of their missions, the five largest noncommercial webcasters are an important focus of this proceeding because they account for about [ ] of the royalties paid to SoundExchange by noncommercial webcasters in 2018 for usage above the 159,140 ATH threshold.[8] Reflecting their broader businesses, statutory royalties accounted for only [ ] of their revenues and [ ] of their expenses in 2018. *Id.* ¶ 1433.

Response to ¶¶ 263-65. SoundExchange incorporates its response to ¶ 262 *supra*.

[8] Calculated as [ ]. Ex. 5625, App. E (Ploeger WRT).

X. TERMS

Response to ¶ 266. NRBNMLC is correct that in *Web IV* the Judges declined to grant NRBNMLC's proposal to exempt noncommercial webcasters from providing reports of use based on a preference to consider the matter in Docket No. 14-CRB-0005 (RM). *Web IV*, 81 Fed. Reg. at 26404. However, at the time of that determination, the Judges had received comments in response to their notice of proposed rulemaking relatively recently. Five years have since passed without any action by the Judges in that docket. For that reason, SoundExchange respectfully asks the Judges to adopt SoundExchange's proposed ISRC reporting term in this proceeding.

There is no doubt that the Judges have the power to do so. Section 114 specifies that the Judges are to adopt reporting regulations without specifying the nature of the proceeding in which that is to occur. 17 U.S.C. § 114(f)(3)(A). Lest there be any question that the Judges' power to adopt such provisions is not limited to rulemakings conducted in a notice-and-comment format, Section 803 specifies that the Judges' determination in a rate-setting proceeding like this one "may specify notice and recordkeeping requirements of users of the copyrights at issue that apply in lieu of those that would otherwise apply under regulations." *Id.* § 803(c)(3).

When the Copyright Office originally adopted reporting requirements for webcasters, it expressly chose "to require a minimal level of reporting at this time" given the lack of reporting capabilities webcasters then had. *Notice and Recordkeeping for Use of Sound Recordings under Statutory License*, 69 Fed. Reg. at 11515, 11522 (Mar. 11, 2004). However, it also said that "[t]hese baseline requirements will be revisited." *Id*.

Reporting of ISRCs is a requirement whose time has come. Since the last action by the Judges in Docket No. 14-CRB-0005 (RM), the need for ISRC reporting has become quite clear. Given the scale of statutory licensing in terms of the number of works in commerce, the number of works used under the statutory license, the number of statutory licensees, and the volume of

incomplete and erroneous data received by SoundExchange, it is not tenable to carry on with the regime of simple text string matching that might have seemed workable on an interim basis when webcasting was in its infancy. *See* SX PFFCL ¶¶ 1673-74. At the same time, access to ISRCs by services has become ubiquitous. *See id.* at ¶¶ 1675-76, 1678. Most recently, Congress has required ISRC reporting for Section 115 purposes. 17 U.S.C. § 115(d)(4)(A)(ii)(I)(aa).

NRBNMLC has cited no evidence suggesting that SoundExchange's proposal for ISRC reporting is not needed and reasonable. The Judges should adopt it in this proceeding even if they intend to later address the other issues raised in Docket No. 14-CRB-0005 (RM).

Dated: October 28, 2020

Respectfully submitted,

By: /s/ David A. Handzo
David A. Handzo
(D.C. Bar No. 384023)
JENNER & BLOCK LLP
1099 New York Ave., N.W., Suite 900
Washington, D.C. 20001
(v) 202-639-6000
(f) 202-639-6066
DHandzo@jenner.com

Counsel for SoundExchange, Inc., Sony Music Entertainment, Universal Music Group, Warner Music Group, the American Association of Independent Music, the American Federation of Musicians of the United States and Canada, the Screen Actors Guild and American Federation of Television and Radio Artists, and Jagjaguwar Inc.

Proof of Delivery

I hereby certify that on Friday, October 30, 2020, I provided a true and correct copy of the SoundExchange's Replies to NRBNMLC's Corrected Proposed Findings of Fact and Conclusions of Law to the following:

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Google Inc., represented by Kenneth L Steinthal, served via ESERVICE at ksteinthal@kslaw.com

Sirius XM Radio Inc., represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Educational Media Foundation, represented by David Oxenford, served via ESERVICE at doxenford@wbklaw.com

National Association of Broadcasters, represented by Sarang V Damle, served via ESERVICE at sy.damle@lw.com

National Religious Broadcasters Noncommercial Music License Committee, represented by Karyn K Ablin, served via ESERVICE at ablin@fhhlaw.com

Signed: /s/ David A. Handzo